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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 42

W. J. MEREDITH, JAMES G. MARTIN and A. R. OHMART,

Petitioners.

versus

THE CITY OF WINTER HAVEN, a municipal corporation, et al.,

Respondents.

BROUGHT UP ON PETITION FOR WRIT OF CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS

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OPINIONS BELOW

No opinions were filed in the District Court. The opinions filed in the Circuit Court of Appeals appear in the Record (R. 189, 198). These opinions are reported in **134 Fed. (2nd) 202.**

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioners sought a writ of certiorari, under **Section 240 (a)** of the **Judicial Code**, as amended, **Title 28 U.S.C.A., Section 347 (a)**, to review a final judgment of the Circuit

Court of Appeals for the Fifth Circuit. The grounds or reasons which petitioners conceived should impel this Court to review the judgment are set out in the petition (pages 16 to 18). Since the petition has been granted, we refrain from repeating them.

STATEMENT OF THE CASE

In July, 1933, the City of Winter Haven had an outstanding bonded indebtedness of approximately $2,148,054.78, principal and interest (R. 3, 4, 27).

The accumulated defaulted interest, as of April 1, 1933, was approximately $195,000.00, and the defaulted principal amounted to around $375,000.00, and the City had been in default in payment of its bonded indebtedness since 1931 (R. 4).

By a resolution adopted July 24, 1933, the City authorized the issuance of its General Refunding Bonds, Issue of 1933, dated April 1, 1933, for the purpose of refunding its outstanding bonded indebtedness (R. 27-84).

The refunding issue was divided into Series "A" bonds, to be exchanged for the outstanding 6 per cent obligations, and Series "B" bonds, to be exchanged for the outstanding 5½ per cent obligations (R.4).

The originally outstanding bonds consisted chiefly of bonds which matured serially from 1930 to 1962 (R. 28-57, 64 and 65).

The General Refunding Bonds, Issue of 1933, postponed all maturities to April 1, 1948, and serially thereafter to April 1, 1963 (R. 5, 11).

An amendatory resolution, adopted March 7, 1934, changing the denominations of certain refunding bonds so as to provide for a more convenient exchange with the holders of outstanding obligations in odd amounts, appears on pages 86 to 93 of the Record.

The authorizing resolution described in detail the outstanding bonds to be refunded (R. 28-57 and 64-65), and also specified the numbers, amounts and maturity dates of the 1933 refunding bonds proposed to be issued (R. 58 and

66), and provided a definite scheme of exchange of new bonds for old bonds, so that it will always be possible for the holder of a General Refunding Bond, of the Issue of 1933, to identify the particular original bond that was refunded by any particular 1933 bond which he holds (R. 19 and 82).

The General Refunding Bonds, Issue of 1933, were validated in statutory bond validation proceedings, under the provisions of **Section 3296, et seq., Revised General Statutes of Florida, Sections 5106, et seq., Compiled General Laws.**

They were not sold on the open market, but were issued in exchange for a corresponding amount of original outstanding obligations of the City, in accordance with the authorizing resolution, which outstanding securities were cancelled and surrendered (R. 21).

As has been stated, the original outstanding debt bore interest at the rate of 6 per cent and 5½ percent, respectively. The 1933 refunding bonds bear semi-annually maturing interest at the rate of 3½ per cent from April 1, 1933 to April 1, 1935, 4 per cent from April 1, 1935 to April 1, 1936, 4½ per cent from April 1, 1936 to April 1, 1937, 5 per cent from April 1, 1937 to April 1, 1943, and thereafter at the rate of 6 per cent in the case of Series "A" bonds (R. 7) and 5½ per cent in the case of Series "B" bonds (R. 13). The differential between the interest rate borne by the original outstanding debt and the semi-annually maturing interest borne by the new refunding bonds for the ten-year period from April 1, 1933, to April 1, 1943, is referred to in the bonds as deferred interest (R. 7 and 13). Payment of the deferred interest was postponed to the final maturity of the refunding bonds, except as hereafter stated (R. 7, 13 and 75).

The originally outstanding bonds were non-callable bonds, each being payable on a definite maturity date, and were not subject to call for redemption prior to maturity (R. 3).

The General Refunding Bonds, Issue of 1933, are callable bonds, the City reserving the right to call and

redeem such bonds, on any interest payment date, by paying a portion of the deferred interest, according to the following schedule:

On or prior to April 1, 1943, the bonds could be called at par, and accrued interest at the rate then prevailing, plus one-half of the deferred or accumulated interest for the ten-year period.

On or prior to two years before maturity of the respective bonds, and during the period of time from April 1, 1943, to and including April 1, 1953, the bonds could be called at par, and accrued interest at the rate then prevailing, plus three-fourths of the deferred or accumulated interest for ten years.

From April 1, 1953, to and including April 1, 1963, the bonds could be called at par, and accrued interest at the prevailing rate, plus the full deferred or accumulated interest for ten years (R. 7, 13, 73 and 74).

Thus the holders of the originally outstanding bonds were induced to surrender their non-callable obligations and to accept in lieu thereof bonds which could be called for redemption by the City, at any time that the City might be able to take advantage of a "cheap money market" by selling new bonds and using the proceeds of such sale to call and retire the 1933 refunding bonds prior to their contract maturity dates.

In the event that the City should exercise its option to call the refunding bonds at a time when low interest rates might prevail, the refunding bondholders would of course be forced to re-invest their funds in a low interest market.

As a consideration for accepting a bond with such a callable feature, it was provided that the bondholder would not completely sacrifice his right to interest at the former contract rate of 5½ or 6 per cent, but would recover, to some extent, the difference between the interest borne by the original non-callable bonds surrendered and the reduced rate of semi-annually maturing interest borne by the 1933 General Refunding Bonds containing the call provision.

It is common knowledge that a call provision renders municipal bonds less desirable from the standpoint of long-term investors, such as insurance companies and savings banks, and tends to depreciate their market value and to hamper their ready negotiation or sale, as has been judicially noticed by the Florida Supreme Court in the case of **State v. Sarasota County, 118 Fla. 629, 159 So. 797,** decided in 1935.

Section 6 of **Article IX** of the **Florida Constitution, as** originally adopted, provides that:

> "The Legislature shall have power to provide for issuing **State bonds** only for the purpose of repelling invasion or suppressing insurrection, or for the purpose of redeeming or refunding bonds already issued, **at a lower rate of interest.**" *

It will be noted that **no limitation** was placed upon the power of the Legislature to authorize the issuance of **municipal bonds.**

On November 4, 1930, **Section 6** of **Article IX**, was amended so as to read as follows:

> "The Legislature shall have power to provide for issuing **State bonds** only for the purpose of repelling invasion or suppressing insurrection, and the **counties, districts** or **municipalities** of the State of Florida shall have power to issue bonds **only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such counties, districts, or municipalities shall participate,** to be held in the manner to be prescribed by law—**but the provisions of this law shall not apply to the refunding of bonds issued exclusively for the purpose of refunding of the bonds or the interest thereon of such counties, districts, or municipalities.**"

---

* **Note: Emphasis has been supplied in some of the quotations in this brief.**

It will be noted that, in the amendment, the provision for a "lower rate of interest" in relation to refunding bonds has been **dropped,** and that it **never did apply** to refunding bonds issued by **municipalities.**

Prior to the issuance of the City of Winter Haven General Refunding Bonds, Issue of 1933, there were no decisions of the Florida Supreme Court indicating that an issue of refunding bonds not authorized at a freeholder election must bear a lower rate of interest than the bonds refunded, and no decisions of that court that threw any doubt upon any of the provisions of the Winter Haven General Refunding Bonds.

On the other hand, the Florida Court in the case of **Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211**, decided in 1931, upheld an issue of refunding bonds of the City of Tampa, bearing interest at the rate of 5½ per cent per annum, that were issued to refund a like amount of 5 per cent bonds.

Mr. Justice Brown speaking for the Court, in an opinion unanimously concurred in, discussed at great length the contention raised by the intervening appellant taxpayer that the City of Tampa could no longer issue refunding bonds bearing a higher rate of interest than the obligations to be refunded, without the issuance of such refunding bonds having been first approved by a majority vote of the freeholder electors of the municipality, because of the provisions contained in amended **Section 6**, of **Article IX**, of the **Florida Constitution**, adopted at the general election held November 4, 1930.

The Court held that the constitutional amendment did not deprive a municipality of the power to issue refunding bonds at a rate of interest greater than the rate borne by the obligations to be refunded, without a freeholder vote, saying, at pages 217 and 218 of 134 So.:

> "The constitutional amendment unquestionably authorizes the issuance of refunding bonds without a vote of the people, **and this court would not be**

authorized to add to the language of the constitutional amendment a condition not therein expressed; that is, by addition of a provision that such refunding should not be permitted unless the refunding bonds should bear no higher rate of interest than the original obligations and should not be sold for less than their full par value. It is the function of this court to construe and interpret constitutional amendments and not to make them. The constitutional amendment plainly provides for the issuance of refunding bonds issued exclusively for the purpose of refunding the bonds or the interest thereon of such counties, districts, or municipalities. The dictionary meaning of the word 'refund' is 'to fund again or anew; to replace (a fund or loan) by a new fund.' It is also a matter of common knowledge that refunding obligations cannot always be accomplished without holding out to the creditor some inducement in the form of an increase in the rate of interest or otherwise, which would cause him to be willing to surrender his existing bonds and take the refunding bonds instead. * * *

"It will be noticed that the only limitation upon the power of counties, districts, and municipalities to issue refunding bonds which is contained in the constitutional amendment is that such bonds be issued exclusively for the purpose of refunding the bonds or the interest thereon of such counties, districts or municipalities. The constitutional provision contains no express language which purports to fix or limit the rate of interest which the refunding bonds shall bear, or to fix the price at which they may be sold. Being wholly silent as to such matters, and no such limitations being clearly implied from the use of the terms in the amendment itself, none will be implied by the court. * * * It is quite probable that the difference between the amount which may be realized from the sale of the refunding bonds and the amount of the original

obligations which are to be refunded must be paid out of the general funds of the city, but if this is done it will not increase the bonded debt of the city."

The bonds then under consideration were being issued under the authority of the **General Refunding Act of 1927, Chapter 11,855, Acts of 1927.**

Subsequent to the decision in the case of **Sullivan v. City of Tampa,** the Legislature enacted the **General Refunding Act of 1931, Chapter 15,772, Acts of 1931,** with provisions similar to those of the **General Refunding Act of 1927,** including the provisions that interest on refunding bonds should not exceed 6 per cent, and that the refunding bonds should not be sold for less than 95 per cent of their par value, which provisions had been construed, upheld and applied in the **Sullivan case.**

The pertinent provisions of these Legislative Acts are set out in Appendix A and Appendix B.

The **Sullivan case** was cited with approval in **State v. City of Miami, 103 Fla. 54, 137 So. 261,** decided October 13, 1931.

In October, 1932, the Supreme Court of Florida decided the case of **State v. Special Tax School District No. 5, of Dade County, 107 Fla. 93, 144 So. 356.**

In that case, a school district had bonds outstanding that were issued in 1926. They were to mature within thirty years from the date of issuance, as required by another section of the Constitution. It was held that the district might issue refunding bonds, in 1932, which need not mature within thirty years from the year 1926, as prescribed for the original bonds, but that the maturities of the refunding bonds might extend beyond the period of thirty years from 1926, and that no freeholder election to authorize the issuance of such refunding bonds was required, although it was recognized that such an extension of maturities would add to the total interest-burden to be borne by the district.

The case affirms the holding in the **Sullivan case,** and reiterates that **the Court will read nothing into the constitutional amendment, by implication.**

On December 22, 1939, nine years after the amendment to **Section 6** of **Article IX** of the **Florida Constitution,** more than eight years after the decision in the case of **Sullivan v. City of Tampa,** and more than six years after the adoption of the resolution authorizing the issuance of the City of Winter Haven General Refunding Bonds, Issue of 1933, and several years after the 1933 bonds had been exchanged for the originally outstanding bonds of the City of Winter Haven, the Supreme Court of Florida decided the case of **Outman v. Cone, 141 Fla. 196, 192 So. 611.**

In that case, the Florida Court did what in the **Sullivan case,** it had held it **could not do,** namely, **it read into the constitutional amendment, by implication,** a provision to the effect that a refunding bond not authorized at a freeholder election must bear a lower rate of interest than the bond refunded; otherwise, the necessary expense of refunding, added to the existing interest rate, would increase the obligation of the bond and prevent the bond from being such a refunding bond as is contemplated by the provision of the constitutional amendment permitting only refunding bonds to be issued without an approving election.

The court therefore held that a provision for the payment of deferred interest at the original rate, less previous payments, where the refunding bonds had not been authorized by the freeholders, was illegal and void.

The court grounded its decision, in part at least, upon the propositions (1) that it was admitted by counsel for the parties litigant that the provisions for deferred interest involved in that case were ambiguous and the taxpayer was entitled to know what his obligation was, and (2) that no good reason was shown to the court for a provision in the bond contract in that case that a greater proportion of deferred interest was to be paid if payment on call should be made with the proceeds of the sale of

new refunding bonds than if payment on call were made from sinking fund moneys.

It will be demonstrated in the Argument that all of the parties litigant in the Outman case were interested in invalidating the deferred interest provisions there involved, and cooperated to obtain that result, and that the opinion makes no reference to the case of **Sulliyan v. City of Tampa,** or other cases inconsistent with the **Outman** decision, including the decision in the case of **State v. Sarasota County, 118 Fla. 629, 159 So. 797,** decided March 4, 1935, wherein it was held that, notwithstanding the constitutional amendment, refunding bonds might be issued, without an election, providing for currently maturing interest at a reduced rate, and providing for the payment of deferred interest to the full amount of the interest rate borne by the bonds being refunded, as a consideration to the refunding bond takers for accepting a callable bond in lieu of an original bond which was non-callable.

Subsequent to the decision in **Outman v. Cone,** the City of Winter Haven authorized the issuance of new refunding bonds to refund its General Refunding Bonds, Issue of 1933, dated April 1, 1933, but repudiated all the provisions of the 1933 bonds relative to deferred interest (R. 22, 23).

In the months of August and September, 1941, the City of Winter Haven published a notice purporting to call for redemption its General Refunding Bonds, Issue of 1933, including bonds owned and held by the present petitioners, without providing for the payment of any portion of the deferred interest (R. 23, 97).

On September 9, 1941, petitioners filed their complaint in the District Court, showing that they were the holders of General Refunding Bonds, Issue of 1933, both Series "A", and Series "B", of the total amount of $297,900.00 (R. 22, 94-96).

By their complaint, the petitioners sought to establish their right to the payment of deferred interest, as provided in their bond contract (R. 24).

In the event that the Court should hold that the de-

ferred interest provisions of the 1933 bonds were invalid, then petitioners sought to be subrogated to the rights of the holders of the original bonds which had been surrendered for the 1933 refunding bonds (R. 25).

In seeking this alternative relief, petitioners relied upon the provisions of the resolution authorizing the 1933 refunding bonds to the effect that if any of the 1933 refunding bonds should be adjudged illegal or unenforcible, in whole or in part, the holders thereof should be entitled to assume the position of holders of a like amount of the indebtedness thereby provided to be refunded and as such to enforce their claim for payment (R. 20, 83).

On September 13, 1941, the Supreme Court of Florida, four days after the filing of the complaint in this case, decided the case of **George Andrews v. City of Winter Haven**, reported in **148 Fla. 144, 3 So. (2nd) 805**, holding the deferred interest provisions of the Winter Haven General Refunding Bonds, Issue of 1933, to be invalid and unenforcible.

However, the provision of the resolution under which a bond holder is to be subrogated to the position of a holder of the original bonds, in the event the refunding bond contract should be declared invalid or unenforcible, in whole or in part, was not called to the attention of the Florida Courts.

On September 27, 1941, the City of Winter Haven and its defendant officials filed their motion to dismiss the complaint in this cause, on the ground that the questions of law involved had been determined by the Supreme Court of Florida adversely to the petitioners (R. 98).

The District Court granted the motion to dismiss but allowed the petitioners to amend their complaint (R. 100).

The petitioners amended the complaint so as to demonstrate that the **Andrews case**, although purportedly brought by a bondholder, for the purpose of establishing the validity of the deferred interest provisions of the City of Winter Haven 1933 refunding bonds, was in fact brought for the purpose of invalidating the deferred interest provisions. The amendment showed that Andrews

was a substantial property owner and taxpayer of the City of Winter Haven, whose property holdings were at least as extensive as his purported bond holdings (R. 102-103). The amendment further showed that no process had been issued in the **Andrews suit,** but that all the pleadings of all the parties had been filed, the argument held, and the decree signed and filed, in the course of a single morning (R. 103, 105), as demonstrated by a certified transcript of the record of the proceedings in the **Andrews suit** attached to the amendment as an exhibit (R. 109-179). The amendment further showed that the briefs filed in behalf of George Andrews, purporting to protect the interests of the bondholdes of the City of Winter Haven, made no reference to the cases of **Sullivan v. City of Tampa,** and **State v. Special Tax School District No. 5 of Dade County,** or any other cases which had been decided by the Supreme Court of Florida prior to the time of the issuance of the Winter Haven General Refunding Bonds, Issue of 1933, and that no effort whatever had been made on behalf of George Andrews to direct the attention of the Florida Supreme Court to the fact that it had announced and declared a contrary principle of law, prior to the time when the Winter Haven refunding bonds were issued, or to invoke the doctrine of both the State and Federal courts that the law to be applied in considering a contract is the law which existed or had been judicially declared at the time when the contract was made. (R. 105-107).

By stipulation of counsel, the motion to dismiss the original complaint in the present case was made applicable to the complaint as amended, the respondents thereby admitting as true the facts set out in the complaint and in the amendment (R. 181 and 182).

The defendants took the position that, under the doctrine of **Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188,** and subsequent cases, the Federal Court was bound to follow the **latest** decisions of the Supreme Court of Florida in determining the validity of the deferred interest provisions, also that the petitioners were not entitled to asssume the position of holders

of the original bonds and as such to enforce the original interest rate, on the ground that the 1933 refunding bonds had not been invalidated as a whole, but that the deferred interest provisions had been declared to be a severable portion of the bond contract which could be invalidated without affecting the validity of the remainder of the contract.

The petitioners contended that the law to be applied by the Federal Court was the law of Florida as it had been announced and declared by the Supreme Court of the State at the time when the bonds were issued, and that the Florida Supreme Court, itself, had held it to be the law in Florida that the rule of decision to be applied in considering a contract is the rule announced prior to the making of the contract, in reliance upon which the contract was made, even though the Court, after the making of the contract, has reached a different decision.

The petitioners further contended that the language of the resolution authorizing the bonds clearly entitled the petitioners to assume the position of holders of a like amount of the original bonds and as such to enforce their claim for payment, in the event that any part of the refunding bond contract should be adjudged illegal or unenforcible (R. 20).

On June 6, 1942, the District Judge dismissed the complaint, as amended, and ordered that the defendants go hence without day.

From that order an appeal was taken.

The present petitioners assigned as error the action of the District Court in not following the case of **Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211**, the Florida Court having previously adopted and followed the "principle of reliance" upon former decisions, as announced in **Gelpcke v. Dubuque, 1 Wall. (U. S.) 175,** (See **Columbia County Commissioners v. King, 13 Fla. 451.**)

Petitioners also specified error in that, after holding the deferred interest provisions of the bond contract to be illegal or unenforcible, the District Court further held that the petitioners were not entitled to assume the posi-

tion of holders of a like amount of the bonds refunded and as such to enforce their claim for payment.

The Circuit Court, erroneously as we contend, decided that the state of the law in Florida on the matters in issue is not clear, settled and stable, and that the Federal courts, though possessing jurisdiction, should decline to exercise it, leaving the petitioners to their remedy in the State courts. Accordingly, the Circuit Court reversed the judgment of the District Court, and dismissed the cause, without prejudice to petitioners' right to proceed in the State courts (R. 200).

Judge Sibley filed a dissenting opinion, in which he took the position that, there being a presently acute, justiciable controversy, the Federal Court was bound to declare the rights of the parties, since the same power and the same duty to decide cases applies to cases between citizens of different states arising under the laws of a state as applies to controversies arising under the Constitution and laws of the United States, and since this case involves no invasion of high state functions or policies as to which caution is due, but only the question of how much this City owes these bondholders on calling their bonds for payment before due.

Judge Sibley apparently thought, however, that the doctrine announced in **Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. St. 817, 82 L. Ed. 1188,** required the Court to follow the **Andrews case** and hold invalid the provision for payment of a part of the deferred interest on call of the bonds, but that justice should be done by remitting the bondholder to his interest rights under the old bonds to the extent necessary to make good the loss caused by the partial unenforcibility of the new bonds (R. 198).

On February 22, 1943, a petition for rehearing (R. 201) was filed by appellants (petitioners), in which they insisted, among other things, that the Circuit Court had considered, sua sponte, matters which the appellants (petitioners) had had no opportunity to argue, and had decided to remit them to their remedy in the State courts.

even though the appellants (petitioners), who were citizens of another state and had shown the jurisdictional amount in controversy, had not had an opportunity to insist that their contract rights be adjudicated in the Federal courts, and that the decisions cited in the majority opinion to support the action of the Court in remitting them to their remedy in the State courts are essentially different from this case.

On March 12, 1943, an order denying the petition for rehearing was entered (R. 206).

On May 24, 1943, the Supreme Court granted the petition of the original plaintiffs for writ of certiorari (R. 209).

SPECIFICATIONS OF ERRORS INTENDED TO BE ARGUED

Since it is provided in Rule 38, paragraph 2, that only the questions specifically brought forward by the petition for writ of certiorari will be considered, we confine our argument to the following questions, which were brought forward by the petition, and which we deem to be of important and general interest:

1. Is the validity of a contract to be determined upon the basis of the decisions that were announced by the highest court of the state prior to the making of the contract, where the State Court has itself adopted the "principle of reliance" announced in **Gelpcke v. Dubuque,** or does the doctrine of the **Erie Railroad case** require that the validity of the contract be determined upon the basis of the "latest" State Court decisions?

2. Where a contract (refunding bond contract) provides that "if any of the bonds hereby authorized be adjudged illegal or unenforcible, in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to be refunded and as such enforce their claim for payment," and where the decisions of the highest court of the state where the contract was made are in harmony with the validity of this provision, if the Federal courts

should be of the opinion that the particular contract in question cannot be enforced in all respects as written, because of State Court decisions announced after the contract was made, but must therefore be adjudged "illegal or unenforcible, in whole or in part," should not the holders of the refunding bonds be held entitled to assume the position of holders of a like amount of the indebtedness refunded and as such to enforce their claim for payment?

3. In a case where the Federal jurisdiction has been invoked, by citizens of another state, who have shown that the jurisdictional amount is involved, and where there is an actual controversy presenting justiciable issues requiring determination and entitling plaintiffs (petitioners) to a declaratory judgment and an injunction in support of such declaration, and where the parties to the controversy have litigated the matter both in the District Court and in the Circuit Court of Appeals, without objection or protest, should not the Federal courts decide the controversy, in the light of the State Court decisions bearing upon the contract rights of the litigants, rather than to remit the plaintiffs (petitioners) to their remedy in the State courts, it being a fact that the case presented involves no invasion of high state functions or policies, but only the question of how much a public corporation debtor owes the plaintiffs (petitioners) under its contract with them?

ARGUMENT

Summary

1. Before the making of the refunding bond contract involved in this proceeding, the decisions of the Florida Supreme Court having a bearing upon the subject indicated that the contract was legal and valid in all respects, even though not providing for a reduction in the rates of interest borne by the bonds being refunded, notwithstanding the provisions of an amendment to the Florida Constitution to the effect that bonds can be issued by municipalities, only after being approved by the affirmative vote of a majority of the freeholders, except that no

such election is necessary in the case of refunding bonds. Although the Florida Supreme Court has since receded from this position, and has now held that refunding bonds must also be authorized at a freeholder election, unless there is a reduction in the interest rate, the Supreme Court of the United States, at the time of the issuance of the bonds here involved, was definitely committed to the doctrine announced in such cases as **Gelpcke v. Dubuque, 1 Wall. (U.S.) 175**, to the effect that the true rule in such cases is that, if the contract, when made, was valid by the laws of the State, as then expounded and administered in its courts of justice, it is still valid, notwithstanding any later decisions overruling the former ones, which rule is sometimes referred to as the "principle of reliance" upon the former decisions, or as the "contract exception" to the general rule that the courts will follow the "latest settled adjudications," and the Florida Supreme Court, prior to the making of the bond contract here in question, had adopted and consistently adhered to this "principle of reliance," or "contract exception." The Florida Supreme Court has never receded from its position in this regard, in any case where the question has been definitely brought before it for decision. It is submitted that, notwithstanding the decision in the **Erie Railroad case**, overruling the doctrine of **Swift v. Tyson**, and notwithstanding the later decisions in which the doctrine of the **Erie case** is considered and applied, the contract is still to be construed, interpreted and enforced, in accordance with the law as it was expounded and administered in the courts at the time when the contract was made.

2. Furthermore, it was provided in the particular bond contract in question that, "if any of the bonds hereby authorized be adjudged illegal or unenforcible, in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to be refunded, and as such enforce their claim for payment." The decisions of the Florida Supreme Court support the validity of this provision. Hence, even if the particular refunding bond contract in question

cannot be enforced in all respects as written, because of the later Florida decisions as to the necessity for freeholder authorization of the refunding bonds, but is adjudged "illegal or unenforcible, in whole or in part," the holders of the refunding bonds are nevertheless entitled to assume the position of holders of a like amount of the indebtedness refunded and as such to enforce their claim for payment.

3. Finally, this being a case where the Federal jurisdiction has been invoked by citizens of another state, who have shown that the jurisdictional amount is involved, and there being an actual controversy presenting justiciable issues requiring determination and entitling plaintiffs (petitioners) to a declaratory judgment and an injunction in support of such declaration, and the parties to the controversy having litigated the question both in the District Court and in the Circuit Court of Appeals, without objection or protest, the Circuit Court of Appeals should not have refused to decide the controversy, and should not have remitted the plaintiffs (petitioners) to their remedy in the State courts, it being a fact that the case presented involves no invasion of high state functions or policies, but only the question of how much a public corporation debtor owes the plaintiffs (petitioners) under its contract with them.

First Question

Is the validity of a contract to be determined upon the basis of the decisions that were announced by the highest court of the State prior to the making of the contract, where the State Court has itself adopted the "principle of reliance" announced in Gelpcke v. Dubuque, or does the doctrine of the Erie Railroad case require that the validity of the contract be determined upon the basis of the "latest" State Court decisions?

To be more specific, this question might be stated thus:

Where the highest court of a state has placed a given construction on a provision of the State Constitution, and municipal bonds are thereafter issued in accordance with,

and accepted in reliance upon such construction, and after such bonds are issued, the State Court, in a subsequent decision, changes is previous construction, but the State Court decisions consistently hold that a contract is governed by the law as announced at the time of its making, and is protected from any subsequent decisions overruling those decisions on which the parties have relied in making such contract, should not the Federal courts, in determining the validity of the bond contract, apply that construction which had been declared by the State Court at the time when the bonds were issued?

The Duty of the Federal Courts to Follow State Decisions

We fully realize that the doctrine of **Swift v. Tyson, 16 Peters 1, 10 L. Ed. 865,** has been overruled by the case of **Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.**

It is conceded that the Federal courts, in cases where jurisdiction is predicated solely on diversity of citizenship, are required to apply the State law, as declared by the State courts, including matters of general law, as well as local law, no matter how unreasonable or ill-advised such decisions may seem.

See: **Wichita Royalty Company v. City National Bank of Wichita Falls, 306 U. S. 103, 59 S. Ct. 420, 83 L. Ed. 515;**

Russell v. Todd, 309 U. S. 280, 60 S. Ct. 527, 84 L. Ed. 754;

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109;

West v. American Telephone & Telegraph Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139;

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 327;

We do not contend that either the District Court or the Circuit Court should have disregarded the State law, and exercised its independent judgment, to determine what the State law **should be,** in passing upon the plaintiffs' bond contract.

What we do contend is that the District Court disregarded and failed to follow the applicable law of Florida, as declared by the Supreme Court of the State, in deciding the questions which were presented, and that the Circuit Court should have reversed the judgment of the District Court, because of the failure of the District Court to follow the applicable Florida law, instead of remitting the parties to their remedy in the State courts.

The Law of Florida is that a Contract is Governed by the Law as Declared at the Time when the Contract was Made.

Some seventy years ago, the Supreme Court of Florida decided the case of **Columbia County Commissioners v. King, 13 Fla. 451.** In that case, the Court refused to hold "railroad bonds" invalid, under a former Florida Constitution, because of the fact that, in the case of **Cotten v. County Commissioners of Leon County, 6 Fla. 610,** decided in 1856, about the time the Columbia County bonds "were being issued," the Court had held such bonds to be valid.

The Court, speaking through Mr. Chief Justice Randall, pointed out that the case of **Cotten v. County Commissioners of Leon County,** "was pending, if not already decided by the Supreme Court, at the very moment that the earliest of the bonds of Columbia County were being issued, and they thus went forth upon the market and into the hands of third parties, not only sanctioned by the Legislature, but by the Judicial branch of the government." The opinion went on to point out that "in the case of **Gelpcke v. City of Dubuque, 1 Wallace (U.S.) 175,** was involved a similar question." The opinion stated that in the **Gelpcke case,** the Iowa Supreme Court had placed a construction on the Iowa Constitution up-

holding powers exercised by the City of Dubuque in issuing municipal bonds, and quoted with approval from the opinion of Mr. Justice Swayne of the Supreme Court of the United States, as follows :

"The earliest of these cases was decided in 1853, and the latest in 1859, and the bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject; we could add nothing to what they contain. **We shall be governed by them** unless there be something which takes the case out of the established rule of this court upon that subject. **It is urged that all these decisions have been overruled by the Supreme Court of Iowa in the latter case of** the State of Iowa v. the County of Wapello, 13 Iowa, 390. * * * It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. * * * However we may regard the late case in Iowa as affecting the **future**, it can have no effect upon the **past**."

The opinion of the Supreme Court of Florida then continued as follows:

"As was said in the case of The Ohio Life and Trust Co. v. Debolt, 16 Howard 432: 'The sound and true rule is, that **if the contract when made was valid** by the laws of the State, as then expounded by all the departments of the government and administered in its courts of justice, **its validity and obligation cannot be impaired by any subsequent** legislation or **decision of its courts altering the construction of the law.**' 'The same principle applies where there is a **change** of **judicial decision** as to the **constitutional power** of the legislature to enact the law * * * It rests upon the plainest principles of justice. **To hold otherwise, would be as**

unjust as to hold that rights acquired under a statute may be lost by its repeal."

The opinion of the Florida Supreme Court concluded the discussion of this phase of the case then before it by saying:

> "Whatever, therefore, might have been the opinions of the members of this court, upon the question of the constitutionality of the law referred to, the fact that the bonds were issued and passed to the hands of third parties long years ago, that they were sanctioned by the judicial department of the government, and by the acquiescence of the people, **it would be an outrage upon** public justice, public credit, and **the rights of the holders** for value **of these bonds, now to step in and nullify the solemn adjudication of the highest court of this State, given when these bonds were about being issued, and upon the faith of which they were sold** for the means used to promote an important public enterprise, and intended to develop and enhance the prosperity and value of property of the citizens of the State."

The doctrine of the **Columbia County case** and of the **Gelpcke case** has been followed by the Florida Supreme Court ever since the **Columbia County case** was decided, and has never been overruled or superseded.

In the case of **State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739**, decided in 1924, the Supreme Court of Florida, speaking through Mr. Justice Whitfield, declared that the principle of **Gelpcke v. Dubuque** and **Columbia County v. King,** is a matter of constitutional right, recognized and protected by the Florida Constitution.

In the case of **Humphreys v. State, ex rel. Palm Beach Co., 108 Fla. 92, 145 So. 858, Text 861,** decided January 17, 1933, six months before the adoption of the resolution authorizing the issuance of the Winter Haven General Refunding Bonds, Issue of 1933, the Supreme Court of Florida said:

"This court has long since held that all the laws which subsist, at the time and place of the making of a contract, and where it is to be performed, enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms, including alike those laws which affect its construction, validity, enforcement or discharge," citing **Commissioners of Columbia County v. King.**

The doctrine of **Gelpcke v. Dubuque**, and **Columbia County Commissioners v. King**, was further affirmed by the Supreme Court of Florida in the cases of

Alta Cliff Co. v. Spurway,
113 Fla. 633, 152 So. 731,

decided on November 28, 1933, rehearing denied March 1, 1934, and

Lee v. Bond-Howell Lumber Co.,
123 Fla. 202, 166 So. 733,

decided March 10, 1936.

The Doctrine of Gelpcke v. Dubuque Has Not Been Overruled

The obligations held by the plaintiffs (petitioners) were incurred on the strength of prior State decisions to the effect that the Florida Constitution permitted the obligations here involved to be incurred, without a freeholder election. The question to be decided is whether or not these obligations are now to be defeated, because of the fact that, since their issuance, the Florida Supreme Court has announced an implied constitutional limitation which, prior to their issuance, it had declared did not exist.

Neither the **Erie Railroad case**, nor any of the other decisions that have followed it, have announced any such doctrine, and it is respectfully submitted that none of such decisions have overruled the **Gelpcke case**. It is true that some of the cases have indicated, as a general proposition, that the Federal courts must follow the latest de-

cisions of the State courts, and that the Federal courts are not at liberty to follow earlier State Court decisions, merely because the Federal Court considers the earlier State Court decisions to be better reasoned, or to reach a more desirable result, than the later decisions overruling them. Nevertheless, it is believed that it has never been held that a State Court decision construing a provision of the Constitution of the State, upon the strength of which decision contract rights have been entered into, is to be disregarded in favor of a later decision overruling the former holding, thereby invalidating the contract, in whole or in part.

As above pointed out, the question of the validity of the deferred interest provisions of the bond contract was not an open one at the time when the bonds in question were issued, but had been settled by the **Sullivan case**. And the point now presented for decision is whether the obligation of the City relative to the deferred interest has been invalidated by the State Court's decision to reverse its previous stand and re-settle the question, after the refunding bond takers had accepted the refunding bonds in exchange for the old ones, since the State Court, itself, has consistently held that bondholders in the position of the plaintiffs (petitioners) are to be protected from the effect of such subsequent decisions.

The respondents insisted, in the District Court, that in the case of **Getz v. Town of Belleair, 120 Fed. 2nd. 494**, the Circuit Court had refused to follow the case of **Gelpcke v. Dubuque**. This contention was first made at the hearing on the motion to dismiss the original complaint. That hearing was held October 14, 1941 (R. 99).

On October 20, 1941, the Supreme Court of the United States denied certiorari in the **Getz case**. **Getz v. Town of Belleair**, 314 U. S. 666, 86 L. Ed. 90, 62 S. Ct. 125.

On March 7, 1942, the District Court entered an order granting the motion to dismiss the original complaint (R. 100).

At the hearing of the motion to dismiss the complaint as amended, the District Judge announced that his de-

cision to enter the order dismissing the original complaint had been based on the action of the United States Supreme Court in denying certiorari in the **Getz case.**

However, it is apparent that, no matter how strenuously the principle of the **Gelpcke case** may have been argued by counsel in the **Getz case,** there was no occasion to apply the rule of the **Gelpcke case,** because at the time of the issuance of the **Getz** (Belleair) bonds the constitutional provision affecting the bonds held by Mr. Getz **had never been construed** by the Florida Supreme Court.

Respondents argued that, in applying the rule of **Gelpcke v. Dubuque,** it is immaterial whether the State Court decisions relied upon were announced prior to the issuance of the plaintiffs' (petitioners') bonds or afterwards. Such an argument misses the whole point of the **Gelpcke case,** as stressed by the opinions of the Supreme Court of Florida adopting and following the doctrine of the **Gelpcke case.**

This distinction, which respondents attempted to dismiss as immaterial, was pointedly drawn by the Supreme Court of Florida in the **Nuveen case.** The Court there carefully distinguished between the position of a bondholder who, like Mr. Getz or Mr. Nuveen, takes bonds before the courts have expressed any opinion on a question of law which is thereafter determined adversely to the interests of such bondholder, and that of a bondholder, who, like the plaintiffs (petitioners) in this case, takes bonds in reliance upon a decision of the highest State Court determining a question of law, and who is thereafter confronted with a later decision of the same court overruling the earlier decision and determining the question adversely to his interests.

The Florida Court held that bondholders like Mr. Getz and Mr. Nuveen, when they accept their bonds, take their chances as to what the Supreme Court will eventually decide about their validity under the Florida Constitution, while bondholders like the plaintiffs (petitioners) in this case acquire property rights, under the law as judicially

declared, which are protected by the Florida Constitution from subsequent contrary decisions.

We have shown that the plaintiffs' (petitioners') right to rely upon the law as announced by the highest court of the State at the time when the bonds were issued, and not to be prejudiced by subsequent contrary decisions is a right expressly recognized by the decisions of the Supreme Court of Florida, which have held it to be a right protected by the Florida Constitution. Therefore, even if the case of **Gelpcke v. Dubuque** had been overruled by the Supreme Court of the United States, which it has not, nevertheless, this Court, under the **Erie Railroad doctrine**, would still be under a duty to apply the rule of the **Gelpcke case**, because it has become a principle of local substantive law of the State of Florida, which has been consistently and repeatedly announced and declared by the Supreme Court of Florida, both before and after the bonds in question were issued, and has never been changed.

The Early Cases Construing the Amendment to the Florida Constitution

The **Florida Constitution of 1885** is still in force, although some of its provisions have been amended or suplemented from time to time.

Section 6 of **Article IX**, as originally adopted, provides that:

> "The Legislature shall have power to provide for issuing **State bonds** only for the purpose of repelling invasion or suppressing insurrection, or for the purpose of redeeming or refunding bonds already issued, **at a lower rate of interest.**"

No limitation was placed upon the power of the Legislature to authorize the issuance of **municipal bonds.**

On November 4, 1930, **Section 6** of **Article IX**, was **amended** so as to read as follows:

> "The Legislature shall have power to provide for issuing **State bonds** only for the purpose of repelling invasion or suppressing insurrection, and

the **counties, districts** or **municipalities** of the State of Florida shall have power to issue bonds **only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders** who are qualified electors residing in such counties, districts, or municipalities **shall participate,** to be held in the manner to be prescribed by law; **but the provisions of this law shall not apply to the refunding of bonds issued exclusively for the purpose of refunding of the bonds or the interest thereon of such counties, districts or municipalities.**" *

The provision for a "lower rate of interest" in relation to refunding bonds has been **dropped,** in the amendment, and it **never did apply** to refunding bonds issued by **municipalities.**

We have pointed out in the Statement of the Case that immediately after the adoption of the constitutional amendment relied upon by the respondents in this case, and **prior to the issuance of petitioners' bonds,** the Supreme Court of Florida, in the case of **Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211,** had decided that, not only was **no reduction in interest** to be borne by refunding bonds **required** by the constitutional amendment, but such amendment even **permitted** refunding bonds to be issued at **an increased rate of interest,** without an approving vote of the freeholders. In that case the court emphatically refused to read into the language of the constitutional amendment the condition or implication which was later announced in the **Outman case.**

We have also shown that, in October, 1932, the court had decided the case of **State v. Special Tax School District No. 5 of Dade County, 107 Fla. 93, 144 So. 356,** re-

* Note: The latter part of the amendment is not confined to bonds issued to refund bonds that have already been refunded, but excepts from the operation of the prior part of the section the issuance of bonds to refund any municipal bonds or the interest thereon when the refunding bonds to be issued are designed merely to extend the time for the payment of the indebtedness. (See: **State v. City of Miami, 100 Fla. 1388, 131 So. 143,** decided December 5, 1930.)

affirming the principle announced in the **Sullivan case**, and that the **Sullivan case** had been cited with approval October 13, 1931, in **State v. City of Miami, 103 Fla. 54, 137 So. 261.**

In September, 1934, about the time that the refunding bonds involved in this suit were being issued, the Supreme Court of Florida decided the case of **Bay County v. State, 116 Fla. 656, 157 So. 1,** in which the court pointed out that **Section 3** of the **1931 Refunding Act,** which also governed the issuance of the bonds here involved, provides that:

> "The right to redeem all or any of the bonds at par before maturity may be reserved **upon** terms and conditions to be fixed by resolution."

The court also held that a provision of the resolution authorizing the refunding bonds involved in the **Bay County Case,** to the effect that, upon stated defaults and conditions, the refunding bonds might revert to the original interest rate of the bonds refunded, was authorized and valid.

In September, 1934, the Supreme Court also decided the case of **State v. Citrus County, 116 Fla. 676, 157 So. 4.**

In that case, the court began to develop the doctrine that the obligation of the original bonds could not be enlarged by the issuance of refunding bonds, without an approving vote of the freeholders, in view of the provision of **Section 6** of **Article IX** of the **Constitution,** as amended in 1930, but in that very case, the Court specifically reaffirmed its holding in the **Sullivan case to the effect that:**

> "A mere increase in the interest rate of refunding bonds over the rate specified in the bonds refunded, was not an objectionable enlargement of obligation in violation of the intent of the constitutional amendment, and was therefore not invalid."

In September, 1934, the Supreme Court of Florida also decided the case of **State v. City of Miami, 116 Fla. 517, 157 So. 13,** wherein the court recognized the legality of regulating, without a freeholder election, the future

obligations of the City, in reference to refunding bonds, by relating such obligations to the increased ability of the city to meet them.

On March 4, 1935, the Supreme Court decided the case of **State v. Sarasota County, 118 Fla. 629, 159 So. 797,** wherein it was held that, notwithstanding the constitutional amendment, refunding bonds might be issued, without an election, to provide for currently maturing interest at a reduced rate, **and to provide for the payment of deferred interest to the full amount of the interest rate borne by the bonds being refunded, because of the fact that the refunding bonds were made callable,** whereas the original bonds to be exchanged therefor had been non-callable.

On October 29, 1938, the Supreme Court of Florida decided the case of **Pierce v. Isaac, 134 Fla. 666, 184 So. 509,** upholding a contract made by the Ocean Shore Improvement District, providing for the refunding of its outstanding refunding bonds, in order that the district might by the issuance of new refunding bonds, relieve itself of its obligation to pay **deferred interest on the refunding bonds previously issued by the district,** by calling and redeeming such outstanding refunding bonds, while it could still call them without paying any part of the deferred interest, under the terms of the refunding bonds that it proposed to again refund. The court specifically assigned the impending liability for deferred interest as a circumstance justifying the new refunding contract.

The Case of Outman v. Cone

On December 22, 1939, nine years after the adoption of the constitutional amendment above mentioned, the Supreme Court of Florida decided the case of **Outman v. Cone, 141 Fla. 196, 192 So. 611.** At that time, plaintiffs' (petitioners') bonds had long since been issued, in exchange for the original bonds of the City of Winter Haven, which original bonds had been surrendered and cancelled. (R. 21).

In the **Outman case,** the Florida Court announced, for the first time, an implied provision in the constitutional amendment, to the effect that a refunding bond, not authorized at a freeholder election, must bear a lower rate of interest than the bond refunded; otherwise, the necessary expense of refunding, added to the existing interest rate, will increase the obligation.

Upon the basis of this newly announced implication, the court decided that a provision for the payment of deferred interest, at the original rate, less previous payments, where the refunding bonds had not been authorized by the freeholders, was illegal and void.

A certified copy of the transcript of record in the **Outman case** has been obtained from the Supreme Court of Florida and will be submitted for the use of the Court This certified copy was likewise before the Circuit Court of Appeals, as is shown by the attached certificate of the Clerk of the Circuit Court.

It appears from the transcript of record that W. D. Outman, the plaintiff in that cause, as a resident and taxpayer of St. Petersburg Special Road & Bridge District No. 13, in Pinellas County, Florida, filed a bill of complaint against the Board of Administration of the State of Florida and the County Commissioners of Pinellas County, Florida, in the Circuit Court of Leon County, Florida, on November 18, 1939, attacking the deferred interest provisions of refunding bonds issued by the District.

The bill of complaint consisted of approximately ten legal-size, typewritten pages and had attached two resolutions containing approximately thirty-five pages. The bill of complaint and the exhibits attached appear on pages 1 to 46, inclusive, of the transcript of record above mentioned.

The transcript shows that no process was issued in the case, but that on the very day that the bill of complaint was filed the defendant Board of County Commissioners joined with the Board of Administration in filing a two-page answer, which appears on pages 47 and 48 of the transcript.

The Court will take judicial notice of the fact that Tallahassee, the county seat of Leon County, is more than 200 miles from Pinellas County. It is apparent that the Board of County Commissioners had advance notice of the bringing of the suit.

On pages 6 and 7 of the transcript, it appears that the deferred interest provisions of two issues of bonds totalling $1,115,000.00 were involved.

From page 58 of the transcript, it appears that, by some remarkable circumstance, one M. E. Smith, claiming to be the holder of one bond of one issue and seven bonds of another issue, had "learned" of the institution of the suit, and that on the very same day that the bill of complaint and the answer were filed, this M. E. Smith was allowed to intervene and to file an answer "on behalf of all holders and owners of bonds issued by St. Petersburg Special Road & Bridge District No. 13 of Pinellas County, Florida, composed of Series A and Series B, and involved in this cause."

His answer appears on pages 58 to 64 of the transcript, and is signed by a firm of attorneys having their offices in St. Petersburg, Pinellas County, Florida.

On pages 65 and 66 of the transcript appears the final decree dismissing the bill of complaint, signed by one of the judges of the Circuit Court of Leon County, dated November 18, 1939, which shows that the pleadings of all parties had been filed, the hearing held, and the final decree entered, all on the same day.

This decision of the lower court was apparently disappointing to all of the parties concerned, for on November 21, 1939, three days after the institution of the suit and the entry of the final decree, a notice of appeal was filed by the plaintiff, W. D. Outman, together with his assignments of error, bearing an acceptance of service by all of the attorneys for the defendants, dated November 21, 1939. (See pages 67-70 of the Outman transcript).

On the same day, counsel for all the parties entered into a stipulation agreeing that the Clerk of the Circuit

Court might proceed immediately with the making up of the transcript; that the transcript might be filed in the Supreme Court of Florida immediately upon its completion, and waiving the rights of the defendants to file additional directions or to file additional assignments of error. (See pages 71-72 of the Outman Transcript).

It is obvious that the interests of the County and those of its taxpayers, in seeking to invalidate the obligation for payment of deferred interest, were identical, and that the interests of the primary litigants therefore were not adverse.

Harter Township v. Kernochan,
103 U. S. 562, 26 L. Ed. 411.

So far as these parties were concerned, there was no controversy.

It is apparent that, both as to the principal litigants and as to the intervenor, the decree was virtually a consent decree.

The attorneys for all the parties, including the intervenor, who purported to protect the interests of the bondholders, must have remained in Tallahassee for three days in order to get up the appeal papers.

The appeal was made returnable December 26, 1939 (See page 68 of the Outman Transcript).

Although under the rules of the Supreme Court of Florida the transcript of record was not due to be filed until the return day of the appeal and the brief of the appellant was not due to be filed until 30 days after the return day, the docket entries show that the transcript of record was filed in the Supreme Court on December 4, 1939, over three weeks before the return day, that the brief of the appellant, W. D. Outman, was filed on December 7, almost three weeks before the return day, and that on December 11, four days after the filing of appellant's brief, there were filed a motion to advance the cause on the docket and for oral argument, the brief of M. D. Smith, the intervenor, the brief of the Board of County

Commissioners, appellees, and a stipulation signed by all counsel of record requesting the court for an immediate decision.

The opinion of the Supreme Court of Florida was filed December 22, 1939, four days prior to the return day fixed in the notice of appeal, and long before the briefs of any of the parties were due to be filed.

It is inconceivable that the case could have been briefed and argued with any degree of thoroughness.

An examination of the opinion reveals no mention whatever of the cases of **Sullivan v. City of Tampa, State v. Special Tax School District No. 5 of Dade County, Florida, Bay County v. State, State v. Citrus County, State v. City of Miami, State v. Sarasota County, Gelpcke v. Dubuque, Columbia County Commissioners v. King,** or any decision of that or any other court.

From what we have pointed out above, it will readily appear that the case was not a bona fide lawsuit, but a "made" case, and that it is not entitled to be regarded as a judicial precedent.

The Case of Andrews v. Winter Haven

At the hearing held on the motion to dismiss the original complaint in the instant case, the respondents relied upon a decision of the Supreme Court of Florida which had been rendered between the filing of the complaint and the filing of the motion to dismiss. This decision is reported as **Andrews v. City of Winter Haven, 148 Fla. 144, 3 So. (2nd) 805.**

Upon learning of this decision, plaintiffs (petitioners) made an examination of the record in the cause and sought permission of the District Court to amend the complaint, in the event the motion to dismiss should be granted, so as to properly bring to the attention of the Court certain features of the **Andrews case.**

These features are set forth in the amendment to the complaint, which appears on pages 101 to 108 of the transcript, and in a certified copy of the record in the **Andrews**

case attached as an exhibit to the amendment (R. 109-179).

It has been shown in the statement of facts that, although Andrews purported to bring his suit for the purpose of upholding the deferred interest provisions of the Winter Haven bonds, nevertheless, as a matter of fact, his interests as a property owner were at least equal to his purported interests as a bondholder. The cooperation existing between the so-called plaintiff and the defendant in that case was equally as remarkable as that which has been shown to exist in the **Outman case.** The amendment to the complaint charged that the **Andrews suit** had not been instituted for the purpose of protecting the rights of Mr. Andrews as a bondholder, but had been brought for the purpose of obtaining a decree favorable to the interests of Mr. Andrews as a property owner, and adverse to the interests of the bondholders. This is amply supported by the record. A complete certified transcript of the proceedings in the **Andrews case,** including photostatic copies of all the papers filed, together with the endorsements, was attached to the amendment. Duplicate photostatic copies were included in the certified record transmitted from the District Court (R. 109-179).

A mere inspection of this transcript shows that no genuine effort to protect the interests of the bondholders could possibly have been made or attempted on the part of Mr. Andrews' counsel, for the bill of complaint was filed, answer was made, motion for decree on bill and answer was interposed, the hearing was held, and the decree was signed and filed, all in the course of a single morning, and before the hour of eleven o'clock, although all the counsel lived in Winter Haven, the hearing was held in Lakeland, some twelve miles distant, and the papers were filed in the Courthouse, in Bartow, a distance of some twelve miles from Lakeland. (R. 102-105).

The amendment to the complaint in the instant case also shows that the briefs filed on behalf of Mr. Andrews in the Supreme Court of Florida, pretending to protect the interests of the bondholders of the City of Winter Haven.

made no reference to the cases of **Sullivan v. City of Tampa, State v. Special Tax School District No. 5 of Dade County, Bay County v. State, State v. Citrus County, State v. City of Miami,** or **State v. Sarasota County** (R. 105-106).

The amendment also shows that no effort whatever was made in the **Andrews case** to invoke the principle, repeatedly announced and consistently adhered to by the Florida courts, that the law as declared and announced at the time when bonds are issued, determines the validity of the bonds, notwithstanding later contrary decisions rendered subsequent to the issuance of the bonds, which principle was announced in the case of **Gelpcke v. Dubuque,** and adopted by the Supreme Court of Florida in the case of **Columbia County Commissioners v. King,** and reaffirmed by the Florida Supreme Court in a number of subsequent decisions (R. 106).

Here again, it is obvious that the case was not a bona fide lawsuit, but a "made" case.

We earnestly contend that such decisions as **Outman v. Cone and Andrews v. City of Winter Haven,** in view of the obviously collusive character of those suits, can have no binding effect on any bondholders, except those who were actually parties to such suits and actively participated in bringing about the decisions. Such decisions can amount to no more than consent decrees or orders approving stipulations of the parties, which bind only those who are parties to the stipulations.

The situation in these cases is similar to that which was disclosed in the case of **Boynton v. Moffat Tunnel Improvement District, 57 Fed. (2nd) 722,** (Text 776, 781), in which the Tenth Circuit Court of Appeals pointed out that a bondholder appearing in State Court litigation had so clearly intervened, **not** for the purpose of protecting the interests of the bondholders, but for the purpose of obtaining a decree adverse to the interests of the bondholders, that no weight could be given to the result of such procedure.

Certiorari was denied.

Moffat Tunnel Improvement District v. Boynton, 287 U. S. 620, 53 S. Ct. 20, 77 L. Ed. 538.

In any event, it is insisted that both the District Court and the Circuit Court, in the instant case, should have applied the rule in **Gelpcke v. Dubuque** and **Columbia County Commissioners v. King,** and subsequent Florida decisions, and held that the Florida decisions applicable to the deferred interest provisions of the plaintiffs' (petitioners') Winter Haven General Refunding Bonds, Issue of 1933, were those decisions which had been rendered at the time when the bonds had been issued and were "about being issued," and that therefore the deferred interest provisions were valid, and that the plaintiffs' (petitioners') bonds could not be called for redemption and the running of further interest thereon stayed, unless called in accordance with the terms of the bonds, which provide for the posting of a prescribed portion of the deferred interest at the time of call.

The Effect upon Contracts of Overruling Decisions

The general rule with reference to the retrospective operation of a decision or a series of decisions overruling a former decision has been stated thus:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. * * * The true rule in such cases is held to be to give a change of judicial construction in respect of a statute the

same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is, make it prospective, but not retroactive."

14 Am. Jur. 345

This doctrine was definitely announced in the case of **Gelpcke v. the City of Dubuque, 1 Wall. (U. S.) 175.**

It is respectfully submitted that there is nothing in the decision in **Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188,** or in the other decisions that have followed it, which overrules the doctrine of the **Gelpcke case.**

In support of what is referred to in the quotation as the "true rule," the following decisions are cited:

Anderson v. Santa Anna Twp.,
116 U. S. 356, 29 L. Ed. 633, 6 S. Ct. 413;

Taylor v. Ypsilanti,
105 U. S. 60, 26 L. Ed. 1008;

Douglass v. Pike County,
101 U. S. 677, 25 L. Ed. 968;

Olcott v. Fond du Lac County,
16 Wall. (U.S.) 678, 21 L. Ed. 382;

Havemeyer v. Iowa County,
3 Wall. (U.S.) 294, 18 L. Ed. 38;

Gelpcke v. Dubuque,
1 Wall. (U.S.) 175, 17 L. Ed. 520;

Ohio Life Ins. & Trust Co. v. Debolt,
16 How. (U.S.) 416, 14 L. Ed. 997.

While this list of citations is by no means exhaustive of the instances in which the rule has been applied, the decisions cited are sufficiently illustrative for our present purpose.

In the case of **Anderson v. Santa Anna Township,** supra, Mr. Justice Harlan, who delivered the opinion, pointed out that it is not necessary that the prior decisions,

rendered before contract rights were acquired, be "analogous in every respect," to the case under consideration.

In the course of the opinion it is said:

> "For it is the long-established doctrine of this court—from which, as said recently in **Green County v. Conness**, 109 U. S. 105, we are not disposed to swerve—that where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law, as declared by the State courts at the time such securities were issued."

And in **Douglass v. County of Pike, 101 U. S. 677**, in an opinion by Mr. Chief Justice Waite, it is said:

> "As a rule, we treat the construction which the highest court of a state has given a statute of the State as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected."
>
> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

It is elementary that the same rules apply to a state court's construction of provisions of the constitution of the particular state as are applicable to its construction of state statutes.

There is an illuminating discussion of this question in an article by Professor Orvill C. Snyder, of the Brooklyn Law School, St. Lawrence University, published in the

summer of 1940, in the **Illinois Law Review, Volume 35, page 121, entitled "Retrospective Operation of Overruling Decisions."**

Professor Snyder states, at page 130 of his article, that:

> "In the cases, retrospective operation of overruling decisions is stated as the general rule but consistently with exceptions. The most discussed exception is the one, taking its rise from certain language in the case of **Ohio Life Insurance & Trust Co. v. Debolt,** which may be called the contract exception. It may briefly be stated to the effect that an overruling decision will not be given retrospective operation to affect contracts made or property rights acquired in reliance upon the decision overruled."

Although, at page 133, he states that the "contract exception" to the retrospective operation of overruling decisions was formerly thought to be based upon constitutional grounds, nevertheless, he demonstrates, at page 139, that the "contract exception" has survived the decisions holding that a change of decision is not the making of a law, in violation of the impairment guaranty of the Federal Constitution.

Professor Snyder discusses at some length the case of **Gelpcke v. Dubuque, 1 Wall. (U.S.) 175,** and the subsequent decisions of the State and Federal Courts following the **Gelpcke case.** He points out that the rule of the **Gelpcke case,** as stated in the opinion, "rests upon the plainest principles of justice." The particular principle referred to he designates as the "principle of reliance."

This "principle of reliance" is a principle of the common law, which is shown by Professor Snyder to ante-date the Federal Constitution. This is demonstrated, at page 146 of the article, by quotations and citations from **Blackstone's Commentaries, Kent's Commentaries,** the **Federalist Papers, Bracton,** and **Coke upon Littleton.**

The principle is that the law is a rule of conduct, that

is, a rule relating to the conduct of a person who is to obey the rule or suffer the sanctions of the law if he does not, and since the only rule anyone can obey is the rule which exists and which he can discover at the time he acts, ignorance of which he will not be allowed to plead as an excuse, therefore, a person has the right to be judged by the rule which, at the time he acts, he can discover and then obey if he will.

This "principle of reliance" forms the basis of the doctrine of **stare decisis.**

It is the same principle that is involved in the constitutional prohibition against ex post facto legislation and against legislation impairing the obligation of contracts. The "principle of reliance" is not the constitutional guaranties themselves, of course, but it is the principle underlying both of these guaranties.

It is a principle of the common law, which existed before the time of written constitutions.

In this connection, it should be noted that **Section 71, Revised General Statutes of Florida, 1920, (Section 87, Compiled General Laws of Florida, 1927), which has been** in force since November 6, 1829, provides that:

> "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are hereby declared to be of force in this State: Provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this State."

Professor Snyder's article states, in footnote 217, on page 144, of **Volume 35, Illinois Law Review,** that the case of **Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188,** "probably requires the federal courts to follow the state rule on retrospection in all issues of state law where the state courts have held expressly either that an overruling decision relates backward or that it relates forward: * * *

"Although the federal contract exception has always been curiously involved with the general law doctrine of **Swift v. Tyson** * * * the overruling of **Swift v. Tyson** does not prevent the federal courts from following the exception where the state courts have not decided that retrospective operation shall be given to its overruling decision."

The article also points out that on December 4, 1939, Chief Justice Hughes, in a concurring opinion, with Justices McReynolds and Roberts, with relation to the retrospective effect of an overruling decision of the Supreme Court of Oklahoma, said:

> "I think that we are not at liberty to assume that the Oklahoma court would so far depart from the plain requirements of justice. * * * The state court has not spoken to that effect."
>
> **Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 60 S. Ct. 215;** (Text 219), decided in 1939.

Pertinent portions of Professor Snyder's article are printed in Appendix C to this brief.

Since the Supreme Court of Florida has expressly declared the "contract exception" or "principle of reliance" to be the law of Florida, (see **Columbia County v. King,** supra, **State ex rel. Nuveen v. Greer,** supra, **Humphreys v. State ex rel. Palm Beach Co.,** supra, **Alta Cliff Co. v. Spurway,** supra, and **Lee v. Bond-Howell Lumber Co.,** supra), it is insisted that the Federal courts are bound by the rule of the **Erie case** to apply the "contract exception" or "principle of reliance" and to follow the rule of **Sullivan v. City of Tampa** in determining the petitioners' rights under their refunding bond contract.

Second Question

Where a contract (refunding bond contract) provides that "if any of the bonds hereby authorized be adjudged illegal or unenforcible, in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to

be refunded and as such enforce their claim for payment," and where the decisions of the highest court of the state where the contract was made are in harmony with the validity of this provision, if the Federal courts should be of the opinion that the particular contract in question cannot be enforced in all respects as written, because of State Court decisions announced after the contract was made, but must therefore be adjudged "illegal or unenforcible, in whole or in part," should not the holders of the refunding bonds be held entitled to assume the position of holders of a like amount of the indebtedness refunded and as such to enforce their claim for payment?

This question might be more specifically stated as follows:

Where the basic resolution authorizing an issue of refunding bonds, to be exchanged for outstanding bonds of a municipality, provides that if any of the refunding bonds be adjudged illegal or unenforcible, in whole or in part, then the holders thereof shall be entitled to assume the position of holders of a like amount of the outstanding indebtedness to be refunded, and as such enforce their claim for payment, and a provision favorable to the bondholders is inserted in the refunding bonds, as a condition of and consideration for a new provision favorable to the municipality, and detrimental to the bondholders, if the provision of the refunding bond contract favorable to the bondholders be thereafter held illegal and unenforcible, are not the bondholders entitled to assume the position of original bondholders, as provided in their contract, rather than be bound by the new provision in the refunding bonds, favorable to the municipality, when they are unable to enforce the consideration for such new provision?

It has been pointed out that the original bonds of the City of Winter Haven were non-callable obligations (R. 3). They were payable on a definite maturity date, and could not be called for redemption prior to such maturity date.

These original non-callable bonds were surrendered by the holders in exchange for the callable 1933 refunding

bonds. The bonds were exchanged according to a definite schedule (R. 19, 21, 82).

Thus, it appears that the bonds held by the plaintiffs (petitioners) in the instant case include General Refunding Series "A" Bonds of the 1933 Issue, bearing various numbers from 721 through 1970, in the total amount of approximately $183,000.00, maturing in the years 1949 through 1962 (R. 94, 95). These refunding bonds were exchanged for bonds maturing in the years 1934 to 1947, inclusive (R. 19, 21, 82).

It also appears that the plaintiffs (petitioners) hold 42 Series "A" Refunding Bonds, bearing various numbers from 2004 through 2204, maturing April 1, 1963 (R. 95), and that these bonds were issued in exchange for original bonds maturing in 1948 and subsequent years (R. 19, 21, 82).

It further appears that the plaintiffs (petitioners) hold Series "B" Refunding Bonds, bearing various numbers from 191 through 292, in the approximate amount of $20,000.00 (R. 96), maturing in the years 1949 through 1961, which were issued in exchange for original bonds maturing in the years 1934 to 1947, inclusive (R. 82), and that the plaintiffs (petitioners) hold 13 bonds bearing various numbers from 311 through 334, maturing April 1, 1963 (R. 96), which were issued in exchange for original bonds maturing in 1948 and subsequent years (R. 19, 21, 82).

So, it is thus seen that the greater portion of the 1933 refunding bonds now held by the plaintiffs (petitioners) were issued by the City in exchange for original bonds which did not mature for several years after the refunding operation of 1933, and a large portion of which even yet, will not have matured for several years. Those original bonds constituted an indefeasible obligation to pay interest at the rates of 5½ and 6 per cent until the maturity of the bonds. The holder of the original bond was under no duty to surrender his bond and appurtenant interest coupons except upon payment of the face amount of the bond and payment of all of the appurtenant interest

coupons thereto attached representing interest to become due to the maturity date of the bond. If the original bonds had not been surrendered in exchange for the 1933 refunding bonds, the holders of the original bonds would today be entitled to receive 5½ and 6 per cent interest on the prinicpal amount, until the ultimate maturity date of such original bonds, which in many cases will be several years in the future.

Since each original bond had a fixed maturity date, and was not subject to call or redemption prior to such maturity date, the city would today be able to retire such a bond only by paying to the holder the full principal amount, plus interest at the contract rate to the maturity date.

The 1933 refuding bonds, which were accepted by the holders of the original bonds in exchange for their old bonds, not only bore interest at a lower rate than the original bonds for the first several years, but contained a provision for call and redemption prior to maturity, which was not present in the original bonds. The holders of the original bonds, however, in accepting the new bonds, containing the call provision, did not entirely surrender their vested right to interest at the former contract rate, for the refunding bonds were made callable prior to maturity only upon payment of a stated proportion of the deferred interest, the full amount of which was otherwise postponed to the maturity of the refunding bonds.

It must be remembered that a callable bond is a less desirable investment than one which is non-callable.

Mr. A. M. Hillhouse, on page 367 of his book, "**Municipal Bonds.**" published in 1936, by Prentice-Hall, discusses the result to the bondholder of accepting a callable refunding bond in exchange for a non-callable original bond, as follows:

> "In many refunding plans, the new bonds carry the optional feature, which makes possible an acceleration of debt retirement as financial conditions improve. Detroit has already exercised

optional feature by calling some of its refunding bonds. **In the case of Detroit and some other cities, this callable feature has worked an unexpected hardship on the bondholders.** Wyandotte, Michigan, may be cited as an example. Early in the depression, and prior to the development of the very favorable municipal bond market, **bondholders cooperated by accepting refunding bonds in exchange for their old holdings. A callable provision was inserted, whereas no such feature had appeared in the old bonds.** When the low interest bond market developed, Wyandotte proceeded to exercise its option. New 2 per cent coupon bonds in the amount of $526,000 were sold in the market for cash, and bondholders owning 4½'s, 4's and 5's were paid off. **They were thus forced to reinvest their funds in a low interest market, being penalized thereby for their earlier willingness to co-operate with the city in a refunding agreement."**

The Supreme Court of Florida, recognizing such experiences, held in **State v. Sarasota County, 118 Fla. 629, 159 So. 797,** that the undertaking to pay deferred interest was a legal provision, which the taker of a refunding bond might legitimately accept as partial compensation for his relinquishment of a non-callable bond in exchange for a callable one, especially where, as here, the burden of indebtedness was not increased, but was decreased by enabling the City to retire the bonds for less than the full amount of the deferred interest, which under the original bond it would have been absolutely obligated to pay in any event.

It was argued in the District Court that the provision which allows the City to call its bonds prior to maturity, thus taking advantage of a "cheap money market," is severable and distinct from that portion of the call provision which specifies that the bonds shall be callable only upon payment of the stated portion of the deferred interest, and that therefore the City is entitled to call the

bonds by paying principal, plus accrued interest, at the low currently maturing rate provided in the bonds, without complying with that portion of the bond contract which requires the City to pay a portion of the deferred interest, as a prerequisite to effecting a call of the bonds.

In other words, the City wants to "eat its cake and have it too."

However, the refunding bond contract protects the bondholders against this very contingency, for Section 20 of the resolution authorizing the 1933 bonds, provided that:

> "If any of the bonds hereby authorized be adjudged illegal or unenforcible, in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to be refunded and as such enforce their claim for payment." (R. 83)

Thus, the takers of the 1933 refunding bonds foresaw the possibility of just such a situation as has now arisen, and the City and its bondholders expressly provided, in the contract, that in such event, the holders of the original bonds, having exchanged their original holdings for the 1933 refunding bonds and cooperated with the City in adjusting its financial affairs, would not be penalized, in the event a portion of the new refunding bond contract should be held invalid, and be forced to accept a contract with one or more features eliminated therefrom, which might very well, as in the instant case, result in a situation which the original bondholders would never have entered into willingly, but would have the option, in such a contingency, to revert to their rights under the original bond contract.

There was nothing unfair or illegal about such a provision. On the contrary, it is extremely unfair to hold, as the District Court has held, that the bondholder, having been induced to surrender his original contract in exchange for a new contract, a vital portion of which has now been whittled away by court construction, must be

bound by that portion of the new contract which survives the decision of the court, and which wholly favors the City, and thus be placed in the position of having accepted a contract which he did not make, and would not have made, and could not have been forced to accept, although at the time of surrendering his original bond, it was expressly stipulated between the bondholder and the City that, unless he chose to do so, the bondhloder could not be forced to accept less than the entire new contract, in the event any portion of it proved illegal or unenforcible.

The respondents in the District Court relied upon the ruling of the Florida Supreme Court in the **Andrews case** that the call provision of the 1933 refunding bonds, could be separated from the deferred interest provision, which forms an integral portion of the call feature, from which the State Court concluded that the City was entitled to call the bonds, but did not have to pay any portion of the deferred interest in order to effect a legal call.

The amendment to the complaint, however, shows that in the **Andrews case** the State Court did not have before it that provision of Section 20 of the authorizing resolution which allows the refunding bond takers to assume the position of holders of a like amount of the original indebtedness in the event any portion of the refunding bond contract should be held illegal (R. 107).

In fact, the amendment shows that no part of the resolution authorizing the 1933 refunding bonds was brought to the attention of the court in the **Andrews case**, either by the pleadings or by the briefs, and that the bond contract was not fully submitted to the Circuit Court of Polk County or to the Supreme Court of Florida (R. 102).

The only portion of the refunding bond contract pleaded in the **Andrews case** was a copy of one of the bonds (R. 142), and a copy of one of the deferred interest coupons (R. 111).

Instead of submitting a copy of the resolution authorizing the 1933 refuding bonds, the plaintiff in the **Andrews case** submitted a copy of a preliminary agreement between the City of Winter Haven and certain creditors who

agreed to set up a refunding agency, which agreement formed no part of the City's contract with its bondholders (R. 119).

There was, therefore, no ruling whatever by the State Court on the right of a holder of the refunding bonds to assume the position of a holder of the original bonds.

Admittedly, the law to be applied by the Federal courts is the State law of Florida, but the Florida cases uphold the plaintiffs' (petitioners') position.

In **Jefferson County v. Hawkins, Trustee, 23 Fla. 223, 2 So. 362**, the Supreme Court of Florida considered a case where the County had issued certain bonds, referred to for convenience as "blue bonds." Later, the County without legislative authorization, issued refunding bonds, in lieu of the "blue bonds," for the principal of the bonds and for the matured interest. The new or refunding bonds were referred to as "white bonds." The Court held that the "white bonds" were void, but that when the County took up the "blue bonds" with the "white bonds," **that did not extinguish the debt, but the debt remained until paid.** It was further held that **the County was obligated to pay interest on the principal of the "blue bonds" at the contract rate**, and to pay interest on the matured "blue bond" interest coupons, from their maturity, at the legal rate of interest.

In the case of **State ex rel Gillespie v. Walthal, 124 Fla. 866, 169 So. 552**, decided July 21, 1936, the Florida Supreme Court, speaking of the identical issue of Winter Haven 1933 refunding bonds involved in the instant case, emphasized the fact that, on the strength of the validation decree, **procured by the City**, the original bonds had been exchanged for the refunding bonds and surrendered to the City, and the Supreme Court of Florida **held** that the **refunding bonds** "therefore **were**, at least **valid extensions** pro tanto of the **original obligations.**"

Neither of these cases has ever been overruled.

The Supreme Court of Florida, following the adoption in 1934 of an amendment to the Florida Constitution exempting homesteads from taxation, has rendered numer-

ous decisions holding that one who accepts a refunding bond issued after the adoption of the amendment, in lieu of an original bond issued prior to the amendment, has the same rights relative to the taxation of homesteads that the holders of the bonds refunded had.

These Florida cases are in line with the general rule on the subject:

> "If the holder of valid bonds surrenders them and receives other bonds which the municipality had no authority to issue, recovery may be had on the old bonds as if the new ones had not been issued." (Citing authorities).
>
> **5 McQuillan on Municipal Corporations, 4930, Section 2349, Note 96.**
>
> "Where the holder of valid bonds surrenders them to the municipality and receives in exchange therefor other bonds which the municipality had not the lawful right to issue, he is not divested of his title to the bonds surrendered and may maintain an action on them after they mature." (Citing authorities).
>
> **44 Corpus Juris 1239, Section 4227.**

In such a case, "the plaintiff, by his act of surrender or exchange, did not alienate his title to the original bonds, notwithstanding they are not under his absolute control," or in his "actual possession."

Deyo v. Otoe County, 37 Fed. 246.

In **City of Plattsmouth v. Fitzgerald, 10 Neb. 401, 6 N.W. 470,** it was held that the fact that an issue of refunding bonds was void, because issued in excess of the limits fixed by law, did not deprive the holder of the right to enforce the obligation of the bonds surrendered in exchange for the refunding bonds, the Court holding that, the debt being still unpaid, and being valid in its inception, and a just debt against the municipality, the City was liable thereon.

The surrender of a negotiable instrument, upon the issuance of a renewal obligation, does not operate to extinguish the debt or to prevent the creditor from recovering upon the original obligation.

Bass v. Inhabitants of Wellesley,
192 Mass. 526, 78 N. E. 543.

If the surrender of an outstanding obligation in exchange for a new obligation that is **void**, in its entirety, does not discharge the original obligation, it necessarily follows that the exchange of an outstanding obligation for a new obligation that is void or unenforcible, in part only, does not discharge the original obligation.

Accordingly, the complaint prayed for relief in the alternative (R. 24, 25), as permitted by **Rule 8, Paragraph (a) Subdivision (3), Federal Rules of Civil Procedure.**

That is to say, the plaintiffs (petitioners) sought to have the call provision of the 1933 refunding bonds declared inoperative, unless fully complied with, by posting the prescribed portion of the deferred interest, but in the event that the Court should refuse such relief on the ground that the deferred interest provision was unenforcible, then the plaintiffs (petitioners), in accordance with the saving clause of the refunding bond contract, asked to be accorded the right to assume the position of holders of the original bonds and declared to be entitled to collect interest at the rate provided for in such original bonds, which were surrendered in exchange for the 1933 refunding bonds now held by the plaintiffs (petitioners), less the amount of interest already paid on such 1933 refunding bonds.

In view of the foregoing decisions and authorities, it seems clear that the District Court committed error, upon refusing the primary relief so sought, in denying the remedy specifically provided in the bond contract for just such a situation.

Third Question

In a case where the Federal jurisdiction has been invoked, by citizens of another state, who have shown that

the jurisdictional amount is involved, and where there is an actual controversy presenting justiciable issues requiring determination and entitling plaintiffs (petitioners) to a declaratory judgment and an injunction in support of such declaration, and where the parties to the controversy have litigated the matter both in the District Court and in the Circuit Court of Appeals, without objection or protest, should not the Federal courts decide the controversy, in the light of the State Court decisions bearing upon the contract rights of the litigants, rather than to remit the plaintiffs (petitioners) to their remedy in the State courts, it being a fact that the case presented involves no invasion of high state functions or policies, but only the question of how much a public corporation debtor owes the plaintiffs (petitioners) under its contract with them?

It is insisted that the Circuit Court of Appeals overlooked the fact that the fundamental matter involved in this case is the contract rights of the plaintiffs (petitioners), that the case does not involve a question of what the local public policy is or should be, that no invasion of state functions is contemplated or in prospect, and that the decisions cited in the majority opinion of the Circuit Court in support of its action in remitting the plaintiffs (petitioners) to their remedy in the State courts do not justify such a course. They are essentially different from this case, in the following respects:

In **Cavanaugh v. Looney, Attorney General, et al., 248 U. S. 453, 39 S. Ct. 142,** certain citizens of a state applied to the Federal Court to enjoin a high official of the State from suing in the State Court to condemn private property for public use, under an applicable statute. It was pointed out that no such injunction "ought to be granted unless in a case reasonably free from doubt" and when necessary to prevent great and irreparable injury, that the jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable, that when considered in connection with established rules of law relating to the power of eminent

domain complainants' allegation of threatened "irreparable loss and damage" appeared fanciful, that the detailed circumstances negatived such view and rather tended to support the contrary one, that nothing indicated that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings, and that if by any chance the state courts should finally deny a federal right the appropriate and adequate remedy by review was obvious. It was held that, exercising a wise discretion, the court below had properly denied an injunction.

In **Gilcrist v. Interborough Rapid Transit Co., 279 U. S. 159, 49 S. Ct. 282,** a New York corporation applied to the Transit Commission of the State of New York for increased rates, and when its application had been denied, it then applied to the Federal Court to enjoin the Transit Commission from taking or prosecuting proceedings in the State Court to test and enforce the old rates, in the face of the fact that, under applicable statutes under which the corporations franchises were granted, the corporation could not have resorted to a Federal Court without first applying to the Transit Commission. The Supreme Court, although reversing an interlocutory injunction order of a District Court of three judges, remanded the cause for further proceedings.

In **Di Giovanni v. Camden Insuance Association, 296 U. S. 64, 56 S. Ct. 1,** an insurance company applied to a Federal Court to cancel two insurance policies (neither of which exceeded $3,000.00 in amount), which policies were alleged to have been fraudulently obtained. The plaintiff sought to invoke the equitable jurisdiction of the Federal Court by the expedient of charging a conspiracy between the beneficiaries, who were husband and wife, and of asserting that the avoidance of a multiplicity of suits was sought. The Court held that the threatened injury to the respondent insurance company was of too slight moment to justify a federal court of equity, in the exercise of its discretion, in according a remedy which

would entail denial of a jury trial to the petitioners and withdraw from the jurisdiction of the state courts suits which could not otherwise be brought into the federal courts. The opiinon points out (a) that the beneficiaries of the policies had filed proofs of loss and were about to begin suits at law against the repsondent to recover the full amounts of the policies, (b) that no suit at law could be maintained upon the policies in the federal courts since neither exceeded $3,000.00, (c) that jurisdiction cannot ordinarily be conferred on a federal court by joining in a single suit separate causes of action in none of which more than $3,000.00 is involved, (d) that there was no showing that the defenses to the policies could not be set up and litigated as readily in a suit at law as in equity, (e) that want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity powers, (f) that the remedy which respondent sought depended upon the slender thread of its right to ask a federal court of equity to save it the possible inconvenience of trying two lawsuits instead of one, (g) that the grounds for relief to a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real and substantial and its necessity must affirmatively appear, and finally, (h) that this tenuous ground for the exercise of equity powers was put forward as the sole medium by which suits might be withdrawn from the jurisdiction of the state courts which could not be removed to or otherwise brought into the federal courts.

In **Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643,** racial discrimination in violation of the Constitution was charged. However, the opinion stated that the case "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open," and that adjudication of the constitutional issue could be avoided if a definitive ruling on the state issue presented would terminate the controversy. It was also observed that there was no adjudication of the state issue by the Texas courts,

and that, "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." The holding was not that the jurisdiction of the federal courts should not be exercised, but that the cause should be remanded to the district court, with directions to retain the bill pending a determination of procedings, to be brought with reasonable promptness in the state court, in conformity with the opinion.

In **Morin v. City of Stuart, 111 Fed. (2nd) 773,** the Court recognized that the appropriate, if not indeed the exclusive remedy, for ousting a municipality chartered by a state from jurisdiction allegedly usurped by the municipality is a proceeding in quo warranto, such having been always reecognized as a function reserved to the states themselves, through the action of the Attorney General of the State.

In **United States ex rel. Horigan v. Heyward, Mayor, et al., 98 Fed. (2nd) 433,** it was held that an inquiry into the very existence of a municipality chartered by a state is in general reserved to the state itself in a direct proceeding by quo warranto.

It is insisted that Judge Sibley was right when he said (R. 198):

> "There being a presently acute justiciable controversy, I think we are bound to declare the rights of the parties, though the grant of injunction is discretionary. The Constitution extends the judicial power of the United States to controversies between citizens of different States arising under the laws of a State, just as fully as to controversies arising under the Constitution and laws of the United States. There is the same power and the same duty to decide both classes of cases. **This case involves no invasion of high State functions or policies as to which caution is due, but only a question of how much this City owes these bondholders on calling their bonds for payment before**

due. Such questions have been decided by federal courts from the beginning."

Respectfully submitted,

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APPENDIX A

Chapter 11855—(No. 50)

AN ACT to Authorize the Issuance of Refunding Bonds by Counties, Cities, Towns and Other Municipal Corporations and Taxing Districts, and to Provide for Their Payment.

Be it Enacted by the Legislature of the State of Florida:

Section 1. That the governing authority of any county, city, town, municipal corporation or taxing district of the State may by resolution authorize the issuance of refunding bonds for the purpose of refunding any bond, note, certificate of indebtedness or other obligation for the payment of which the credit of said county, city, town, municipal corporation or taxing district is pledged, at or prior to maturity in the manner provided in this Act.

Sec. 2. Said refunding bonds may be issued within three months prior to the date of maturity of the obligations proposed to be refunded, or if said outstanding obligations shall be callable, within three months prior to the callable date. Refunding bonds may be delivered under the provisions of this Act at any time regardless of the date of maturity or optional dates of the obligations refunded, upon the surrender by the holder of a like amount of the obligations refunded. All obligations refunded under the provisions of this Act shall be immediately canceled in such manner as the governing authority shall prescribe.

Sec. 3. Said refunding bonds may be in coupon or registered form, or may be coupon bonds with privilege of registration as to principal only or as to both principal and interest, under such terms and conditions as the governing authority may prescribe. The governing authority may designate a bank or trust company within the State of Florida to act as registrar for said bonds. All bonds issued

hereunder shall mature in annual instalments of not less than three per cent of the total amount thereof, beginning not more than three years after date and running not longer than twenty-five years after date. They shall bear interest at a rate not exceeding six per centum per annum, payable annually or semi-annually, and shall be executed in such a manner as the governing authority shall determine. Said bonds may be sold at public or private sale, and said bonds shall not be sold for less than ninety-five per centum of their par value and accrued interest to date of delivery.

Sec. 4. All special assessments levied on account of any improvement to finance which the obligations so refunded were issued, upon collection shall be paid into the sinking fund for the payment of the refunding bonds, and the proceeds of said special assessments shall be used for no other purpose. For the payment of all bonds issued under the provisions of this Act, the full faith and credit of the county, city, town, municipal corporation or taxing district, shall be pledged, and there shall be levied annually upon all taxable property therein, a tax sufficient to provide for the payment of said bonds and the interest thereon at maturity. All bonds issued hereunder for the purpose of refunding obligations which are excepted from any limitations of indebtedness, shall likewise be excluded in applying any limitation of indebtedness prescribed by any statute of the State or City or Town Charter.

Sec. 5 In the event refunding bonds are issued under the provision of this Act prior to the date of maturity or option date, of the obligations proposed to be refunded, the proceeds of said refunding bonds shall be deposited in a bank or trust company within the State of Florida, which depository shall give a surety bond, or other such bonds as are authorized by law to be accepted for securing County and City funds, satisfactory to the Comptroller of the State of Florida for the full amount of money so deposited, and the funds so deposited shall only be withdrawn with the approval of the State Comptroller, for the purpose

of paying the obligations to refund which said bonds were issued.

Sec. 6. No proceedings shall be required for the issuance of bonds hereunder, except such as are prescribed by this Act, any provisions of the general laws of the State of Florida or of any special act or municipal charter applicable to the political subdivision issuing said bonds, to the contrary notwithstanding.

Sec. 7. This Act shall take effect upon its approval by the Governor, or upon its becoming a law without such approval.

Approved June 6, 1927.

APPENDIX B

Chapter 15772—(No. 54)

(Title Omitted)

Be it Enacted by the Legislature of the State of Florida:

Section 1. This Act may be cited as the General Refunding Act of 1931.

Section 2. Each county, city, town, special road and bridge district, special tax school district, and other taxing districts in this State, herein sometimes called a unit, is hereby authorized to issue, pursuant to a resolution or resolutions of the governing body thereof (meaning thereby the board or body vested with the power of determining the amount of tax levies required for taxing the taxable property of such unit for the purpose of such unit) and either with or without the approval of such bonds at an election, except as may be required by the Constitution of the State, bonds of such unit for the purpose of refunding any or all bonds, coupons or interest on any such bonds, or coupons or paving certificates of indebtedness, or interest on any such paving certificates of indebtedness, now or hereafter outstanding, or any other funded debt, all of which are herein referred to as bonds, whether such unit created such indebtedness or has assumed, or may become liable therefor, and whether indebtedness to be refunded has matured or to thereafter become matured.

Section 3. Such resolution or resolutions shall determine the rate or rates of interest to be paid, not exceeding six per centum per annum, payable annually or at shorter intervals, and the maturity or maturities of the bonds which shall be at a time or times not exceeding sixty years from the date of the bonds, (except that in the issuance of bonds of taxing districts where the maturities are fixed under the Constitution, then such maturities shall be in accordance with the maturities fixed in the constitutional provision), as well as determine the medium of payment

and the place or places in Florida or any other state at which the prnicipal and interest shall be payable. In the discretion of the governing body the right to redeem all or any of the bonds at par before maturity may be reserved upon terms and conditions to be fixed by resolution.

Section 4. Any such unit may obligate itself to redeem any or all of the refunding bonds before maturity on such terms and conditions as the resolution authorizing such bonds may determine. Bonds subject to redemption shall state the manner of giving notice of intention to redeem (which may be by publication without actual notice), and when such notice has been given such bonds shall not bear interest after the date fixed in such notice of redemption, nor shall coupons maturing thereafter be valid, provided that adequate funds for their redemption shall have been provided and set aside by such unit.

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Section 6. One resolution may provide for several separate series of refunding bonds. Each of such series and separate bonds of the same series may have different terms and provisions from the others. The same bonds may bear different rates of interest at different times. Bonds issued for the purpose of refunding accrued interest may be non-interest bearing or may bear a lower rate than other bonds of the same series as may be provided in the resolution.

Section 7. Such resolution may provide that all or any part of the bonds issued thereunder shall mature in annual installments beginning at such time after date and running not longer than sixty years after date as said resolution may provide.

Section 8. Bonds issued under this Act may be exchanged for not less than an equal principal amount and/or accrued interest of indebtedness to be retired thereby, including indebtedness not yet due, if the same be then redeemable or if the holders thereof be willing to surrender the same for retirement, but otherwise shall be sold and the proceeds thereof shall be applied to the

payment of such indebtedness and/or accrued interest due or redeemable which may be so surrendered.

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Section 10. No bonds shall be sold under this Act at less than ninety-five per cent of par, with accrued interest to date of delivery thereof.

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Section 14. As hereinbefore provided the refunding bonds instead of being sold may be exchanged for bonds or for interest on bonds or interest on overdue interest on bonds to refund which they are issued. The principal and accrued interest of the refunding bonds shall not exceed the amount of the obligations refunded.

Section 15. If the refunding bonds bear a lower rate of interest than the bonds for which they are exchanged, either the resolution authorizing the bonds or the refunding bonds themselves may provide that the refunding bonds shall bear the lower rate of interest only so long as the unit shall not be in default of any agreement or obligations to the holders and that after any such default, or at the option of the holders after any such default the refunding bonds shall bear the same rate of interest as the bonds for which they were exchanged. The unit may impose limitations on the right to exercise such option, and may provide that the option may only be exercised after a period of default, or by the holders of a certain amount or proportion of bonds, all as provided in the said resolution or in the refunding bonds, and if the right to the higher interest accrues may agree to substitute new bonds and coupons bearing such higher interest.

Section 16. The resolution authorizing the refunding bonds may contain an agreement on the part of the unit to provide a sinking fund for such bonds, and said resolution may provide for payments of such sinking fund, the investment thereof, the administration thereof, and the application thereof to the payment, purchase and redemption of the refunding bonds.

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Section 24. Any election which may be held to determine whether any such refunding bonds shall be issued, if required by the Constitution of the State, shall be called, noticed and conducted, and the result thereof determined and declared as shall have been or may be required by law for the issuance of any bonds of the unit proposing to issue the bonds herein authorized; but if an election be not required by the Constitution and nevertheless be held, it may be called, noticed and conducted, and the result thereof determined and declared, in such manner as the governing body may provide by resolution. It shall not be necessary to hold any election for the issuance of any refunding bond, except in those cases in which an election is required by the Constitution of the State of Florida.

* * *

Section 27. This Act constitutes full authority for the things herein authorized, and no proceedings, publications, notices, consents or approval shall be required for the doing of the things herein authorized except as are herein prescribed and required. This law shall be deemed complete within itself except insofar as other laws are specifically made applicable, nor shall powers hereby granted be restricted or limited by any other law.

Section 28. The several clauses and parts of this Act are mutually independent of each other, and if any part of this Act should be declared unconstitutional or void or invalid no other part of this Act shall be affected thereby.

* * *

Section 30. Refunding bonds provided to be issued under this Act shall be subject to validation and judicial proceedings in like manner and with like force and effect as bonds generally are provided to be validated by judicial proceedings under the laws of this State.

* * *

Section 33. No proceedings shall be required to be taken as to the issuance of any refunding bonds under this Act, except those prescribed by this Act, any provisions of

any other law, general or special, to the contrary notwithstanding.

* * *

Section 36. That this Act shall become effective immediately upon its passage and approval by the Governor, or upon its becoming a law without his approval.

Approved July 29, 1931.

APPENDIX C

EXCERPTS FROM THE ARTICLE ENTITLED

"RETROSPECTIVE OPERATION OF OVERRULING DECISIONS"

35 Illinois Law Review 121

EXCEPTIONS TO RETROSPECTIVE OPERATION

In the cases, retrospective operation of overruling decisions is stated as the general rule but consistently with exceptions. The most discussed exception is the one, taking its rise from certain language in the case of **Ohio Life Insurance & Trust Co. v. Debolt**, which may be called the contract exception. It may briefly be stated to the effect that an overruling decision will not be given retrospective operation to affect contracts made or property rights acquired in reliance upon the decision overruled. Much ink has flowed in efforts to restrict the rule against retrospection to this exception, in attempts to narrow the exception itself, and in explanations of its basis.

It has been declared that the only exception pertains solely to contracts and property rights acquired by contract. However, a personal-rights exception has appeared in criminal prosecutions; and puzzling, perhaps peculiarly instructive, is the fact that when this happened the contract exception was introduced into the reasoning with the personal-rights exception later being cited to support the contract exception. It has been sought to narrow the contract exception to cases in which decisions construing statutes are overruled but the exception had been announced in the field of constitutional construction and has emerged in the field of pure case law. It has been essayed to confine the contract exception to cases of actual reliance on the overruled decision—with the result

of raising a presumption of reliance.[111] It has been suggested that the contract exception is one of the federal courts not recognized by state courts; that it is followed by the federal courts only in cases originating in these courts but not by the Supreme Court in cases coming to it from state courts of last resort; and that when followed by the federal courts it is followed only in cases involving questions of state law. Yet the exception has spread widely among state courts and there with extended scope. Even in the federal courts the original dictum was uttered in a case in which the Supreme Court was reviewing the decision of a state supreme court;[115] and it cannot be overlooked that another case, often cited as an exception to the retrospective operation of overruling decisions although this seems clearly an erroneous view of the case, was decided by the Supreme Court in reversing the Court of Appeals of New York. Moreover, when considering the validity of a federal statute in an action originating in a federal court—a question of federal law in a federal court, the Supreme Court has said that "an all inclusive statement of a principle of absolute retroactive invalidity cannot be justified,"[117] i.e., that relation backward of a

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[111] (In footnote 111, the author demonstrates that "the prevailing rule is that this reliance need not be affirmatively shown, but will be implied from the attendant circumstances of the case," and that "reliance will be presumed until it is affirmatively proved that there was no reliance.")

[115] Ohio Life Insurance Co. v. Debolt, supra note 102.

[117] Chicot County Drainage District v. Baxter State Bank, 60 S. Ct. 317, 319 (1940). In this case an action was brought on some bonds in a United States district court. The defendant set up an earlier decree of the same court cancelling the bonds and enjoining their enforcement. The decree was held invalid by the lower courts "because, subsequent to its entry, this Court in a proceeding relating to a municipal district in Texas had declared the statute under which the District Court had acted to be unconstitutional." The Supreme Court said: "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree." Citing Norton v. Shelby County, 118 U.S. 425, 442 (1886), and Chicago, Indianapolis & Louisville Ry. Co. v. Hackett, 228 U.S. 559, 566 (1913). The Court continued: "It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence

decision holding a federal statute invalid may be limited. If so, why not the retrospective operation of a decision overruling a previous decision? All in all, trying to reduce the rule against retrospective operation to a little, narrow exception seems somewhat signally marked with insuccess. The rule is hard to confine.

BASIS OF THE CONTRACT EXCEPTION

In the beginning it was thought that the contract exception should be based upon constitutional grounds, as the following widely quoted passage from **Douglass v. Pike County** witnesses: "The true rule is to give the change in judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retrospective. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment * * * We cannot give then a retroactive effect without impairing the obligation of contracts long before entered into." The import of this seems to be that the judicial act of construing a statute is **making** law as much as the enactment of a statute by a legislature, and, hence, is **passing** a law within the meaning of the constitutional guaranty of the obligation of contracts.

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of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official." Can it not also be said that the actual existence of a decision is an operative fact which must be considered when the decision is declared to be invalid by overruling? The overruled decision cannot totally be erased by a new judicial declaration. While the overruled decision truly never was law, the unconstitutional statute also truly never was law.

If we are to judge by the citations in practically every case giving it, Mr. Chief Justice Taney originated this theory in 1853 in the case of **Ohio Life Insurance Co. v. Debolt, which,** as was asserted, involved a change of construction of the constitution of Ohio. A charter containing tax exemptions had been granted in 1845. For half a century it had been considered that the constitution of the state did not prohibit tax exemptions in charters, and it was contended that the Ohio court upheld legislation of 1851 by changing its construction of the constitution thereby impairing the charter contract. The Chief Justice indicated that such a change could constitute an impairment of a contract. In so saying, he relied upon **Rowan v. Runnels,** decided in 1847. In this case, originating in the federal courts upon notes given for the sale of slaves, the Supreme Court followed a construction of the constitution of Mississippi made by it before the notes were given rather than a construction made by the courts of Mississippi after the notes were given. The **Debolt** idea was referred to in 1863 in **Gelpcke v. Dubuque** and in 1879 in **Douglass v. Pike County,** both of which presented a change of decision by the supreme court of a state on the constitutional validity, under the state constitution, of state legislation. These are the sources of the contract exception. Since each case involved the meaning of a constitution, the theory announced in them considered as a theory of making law, is a theory of making constitutional law. Hence, the theory originated as one of constitutional construction rather than of statutory construction. However, many state courts extended the theory to the field of statutory construction.

COLLAPSE OF A CONSTITUTIONAL BASIS

But the theory has not provided a constitutional basis for the contract exception. In the field of statutory construction, the Supreme Court has repeatedly held that a change of decision by a state court as to the "meaning and scope" of a state statute is not making a law in violation of the impairment guaranty. In the field of constitu-

tional construction, the Supreme Court had deserted the theory even before **Douglass v. Pike County** was decided; for in **Railroad Co. v. McClure**, the court had held that, although a state constitution is a law within the meaning of the impairment guaranty, a change in judicial construction of a constitution does not violate that guaranty —a view frequently reiterated. While several state courts adopted the making-law-impairing-contracts view in the field of statutory construction and some in the field of constitutional construction, others rejected it outright; and those accepting the theory did so after **Railroad Co. v. McClure** so that their views constituted a misapprehension even at the time of announcement.

* * *

But there is no reason to believe the contract exception disappears with constitutional theories about it. The first definitive announcement of the exception was in 1863 in **Gelpcke v. Dubuque**; for **Ohio Life Insurance & Trust Co. v. Debolt**, decided in 1852, and **Rowan v. Runnels**, decided in 1847, were but dicta. The **Dubuque case** did suggest the impairment guaranty as the basis of the exception to retrospective operation of the overruling decision. However, in 1870, in **Railroad Co. v. McClure**, the Court expressly held, in a case coming up from a state court, that such a change of decision does not violate the impairment guaranty, taking a position since maintained. The rule of the **Dubuque case** survived the rejection of the impairment guaranty; for it was followed after 1870. Even after the impairment guaranty had again been squarely rejected, in 1895, the Court, in 1900, announced that it would follow the **Dubuque case** in cases coming up from the lower federal courts, although in 1899, the Court had held that it would follow the **McClure case** in cases coming up from the state courts. The other of the four sources of the contract exception, **Douglass v. Pike County**, decided in 1879 and containing the widely quoted passage stating the making-law-impairing-contracts theory, followed the same rule as the **Dubuque case**, although it did not overrule the **McClure case** which was followed after 1879

Moreover, after the Court had in 1895 rejected the argument for the guaranty of due process of law as a basis of the contract exception, it reaffirmed the positions taken in both the **Dubuque case** and the **McClure case**; and, after having the due-process contention again urged upon it in 1905, the Court, in 1924, again expressed an approving view of the rule of the **Dubuque case** but said that case, if it had come up from a state court would have involved "no federal question." Consequently, while the Supreme Court has never followed the contract exception on any ground in cases coming up from state courts, the exception [179] in the "independent jurisdiction" exercised in cases coming up from the lower federal courts still survives, notwithstanding that any imagined constitutional basis for it has totally disappeared or has not been discovered.

REAL BASIS OF THE EXCEPTIONS

In Gelpcke v. Dubuque, the positive statement is made that the exception "rests upon the plainest principles of justice." Nine years later in **Olcott v. Supervisors**, the Court repeated that "such a rule is based upon the highest principles of justice." Sixty-one years later, the Court said that the exception had been adhered to in cases coming up from the lower federal courts "where gross injustice would otherwise be done." In commenting on the federal rule, five years after its anouncement, the Supreme Court of Iowa said that "the opinion professes to be planted, in its own language, upon 'truth, justice, and law.'" In 1906, the same court denominated the exception as "a sort of equitable doctrine." The Supreme Court of Kansas has called it "only a rule of policy." The Supreme Court of North Carolina has referred to it as a

[179] **The cases seem to deal only with changes of decision as to the constitutional validity of statutes. However, since the Supreme Court has always treated cases of constitutional construction and statutory construction coming up from state courts exactly the same (Railroad Co. v. McClure, supra note 166, and Central Land Co. v. Laidley, supra note 169), there is no reason to believe that it would not treat them the same in cases coming up from the lower federal courts.**

rule "based upon the highest principles of justice;" and the Supreme Court of Appeals of West Virginia has declared that "it is difficult to sustain this exception on principle. * * * It is plainly an exception made by the courts at the call of justice." This view—that the "principles of justice" constitute the basis of the federal contract exception—conforms to the fact that the Supreme Court has developed the exception only in its "independent jurisdiction" and has never announced any constitutional basis for it which it has not expressly repudiated.

The contract exception in the state courts has been, it is true, frequently planted on the making-law-impairing-contracts passage from **Douglass v. Pike County.** However, in statutory construction cases, other grounds have been announced. The Supreme Court of Alabama, along with the making-law-impairing-contracts reason, declared, in **Farrior v. New England Mortgages Security Co.,** that retrospection of overruling decisions "must be radically wrong. Such principle or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the supreme court of the state." The Supreme Court of Montana, without assignment of other grounds, said: "It would be manifestly unjust and improper to deprive the shipper of its legal right * * * simply because of the later opinion expressed by this court repudiating its former decision." The Supreme Court of North Carolina in **Hill v. Atlantic & North Carolina Railroad Co.,** set alongside the impairment guaranty another reason in the following words: "This court in **State** v. Bell, gave practical effect to the rule that the reversal of a precedent should not be allowed to work an injustice. * * * Was that not the only fair and proper course to pursue, and would other have commended itself to our sense of right? The opposite rule would have met strong condemnation, as being contrary to the plainest principles of justice." And that court did more. It linked the contract exception with the personal-rights exception of the criminal case of **State v. Bell,** in which the court had reasoned: "While it is true no man has a vested right

in a decision of the court, it is equally well settled that where, in the construction of a contract or in declaring the law respecting its validity, the court thereafter reverses its decision, contractual rights as acquired by virtue of the law as declared in the first opinion will not be disturbed. We have diligently searched for authority by which courts have been governed in cases such as the one before us. We find nothing very satisfactory. * * * We have deemed it but just to the defendants and not at variance with any authority in this court, to order a new trial. * * * If the defendants shall be able to establish their defense in accordance with the ruling in **Neal's** case, they are entitled to do so; but the construction now put upon the statute will be applied to all future cases." If the contract exception and the personal-rights exception applied in criminal prosecutions are related, that relation, since no constitutional ground is given in the criminal case, must be that the two exceptions rest upon the common ground of the "plainest principles of justice." While both **Hill v. Atlantic & North Carolina Railroad Co.** and **State v. Bell** are cases involving changed constructions of statutes, the North Carolina court has, relying upon them, extended the contract exception to cases overruling common law precedents. In **Hill v. Brown**, that court, in addition to the impairment guaranty, gave the following reason:

"We deduce the well-settled principle from a number of authorities that the law of contract enters into the contract itself, and, in the construction, forms a part of it. It is practically a dormant stipulation in the contract, and it must be enforced as a part of it, and as it is construed at the time the contract is made." But the court did not stop there; it went on to say that the principle it was applying had been fully recognized in **Hill v. Atlantic & North Carolina Railroad Co.**, quoting therefrom what was quoted in that case from **State v. Bell.** By this line of reasoning the court unshackled the contract exception and grounded it, both in cases overruling statutory constructions and in cases overruling common law precedents.

on the same "principles of justice" which are to be observed also in criminal cases. In denying retrospection of a decision overruling an equity precedent, the Supreme Court of Alabama stated that it did so "that no injustice may be done." Consequently, the contract exception in some state courts too has been rested on "principles of justice" as a sole ground or as a ground in addition to the impairment guaranty.

This view is confirmed by the personal-rights exception in the criminal cases. We have already seen how **State v. Bell** and the contract exception have been linked together. In **State v. Longino,** the Supreme Court of Mississippi mentioned the contract exception as if to indicate that its reason is fully in accord with the following: "We think that a change of decisions involving the interpretation of criminal statutes should have a prospective effect. This rule seems to be just and the most reasonable rule. This rule applies the same principle as the constitutional prohibition of ex post facto legislation. It will prevent injustice and also prevent cruel and unusual punishment." The court also cited **Ingersoll v. State,** which was a prosecution under a liquor law of 1853. The statute had been upheld by the courts but was repealed by an act of 1855. The repealing act had been held invalid in 1858. The Supreme Court of Indiana then stated: "Under such circumstances, it would be unjust—would be a violation of all principles of right—to hold that the act of 1853 was all this time in force, and the people incurring its penalties. It would make the law a concealed trap to catch victims." In **State v. O'Neil,** a case involving a change of decision on the constitutional validity of a penal statute, the Supreme Court of Iowa, after discussing the contract exception, stated: "These cases are cited, not as indicating any constitutional duty on the part of the courts of a state to protect a litigant in rights which he in good faith supposed he had already acquired by reason of previous decisions of the same court in other cases, but for the purpose of illustrating the extent to which a court may properly go in administering

the law for the purpose of effectuating justice; that is, for the purpose of rendering such decision as shall appeal to intelligent and fair-minded people as right and proper. * * * The assumption is that the statutory criminal law is to be administered in accordance with the general principles of right and justice recognized in the common-law system. * * * Respect for the law * * * is weakened if men are punished for acts which according to the general concensus of opinion they were justified in believing to be morally right and in accordance with law. * * * We do not believe such exception to be against public interest but rather in furtherance of justice. Since the Supreme Court of the United States has held that a change of decision in the construction of a substantive criminal statute or in a rule of criminal procedure does not violate the ex post facto prohibition and has rejected the contention that the guaranty of due process of law is infringed by overruling "well-established precedents" in a case of criminal contempt, the personal-rights exception of the criminal cases also must rest on the "principles of justice" rather than on constitutional grounds. And the inter-linking of this exception and the contract exception in the reasoning supporting each re-emphasizes that the "principles of justice" are the foundation of the latter too.

(For the sake of brevity, we have omitted various footnotes, giving citations, cross references and comments.)